

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF WISCONSIN
3 NEIL GAIMAN and MIRACLES AND)
4 MARVELS, LLC.,)
5)
6 Plaintiffs,)
7)
8 vs.) NO. 02-C-0048-S
9)
10 TODD MCFARLANE, et al,)
11)
12 Defendants-Counterclaimants.)
13
14 APPEARANCES:
15
16 FOLEY & LARDNER
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21
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23
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 On Behalf of Image Comics, Inc.
 ALSO PRESENT: TODD MCFARLANE, WYMAN DENNISON (Both via
 telephone.)

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7	(Exhibits retained by Mr. Kahn)	

8 IT IS STIPULATED AND AGREED by and between
9 counsel for plaintiffs and counsel for defendants that
10 the deposition of DENNIS KITCHEN (via telephone
11 conference call) may be taken by and on behalf of the
12 defendants, pursuant to the provisions of the Federal
13 Rules of Civil Procedure and applicable court rules on
14 September 10, 2002, at the office of Blackwell, Sanders,
15 Peper, Martin, 720 Olive Street, 24th Floor, St. Louis,
16 MO 63101, by LISA A. SMITH, RPR, CCR, IL CSR, a Notary
17 Public within and for the County of Jefferson, State of
18 Missouri; that this deposition may be taken with the
19 same force and effect as if all statutory requirements
20 had been complied with.

21 IT IS FURTHER STIPULATED AND AGREED that any and
22 all objections to all or any part of this deposition are
23 hereby reserved and may be raised on the trial of this
24 cause, except as to the form of the question, and that
25 the signature of the deponent is reserved.

1 MR. KAHN: Joan, is that you?

2 MS. EADS: It is, and I have the witness, Dennis
3 Kitchen with me.

4 MR. KAHN: Good. And let's make sure everybody
5 is on the line. Joan, this is Michael Kahn. I'm in
6 St. Louis and I represent the McFarlane defendants. And
7 I guess the other people on the line, why don't you go
8 one by one and give your name to the court reporter, who
9 is here in St. Louis, and state who you represent.

10 MR. FELDMANN: This is Scott Feldmann, and I
11 represent Defendant Image Comics, Inc.

12 MS. CARTER: Gina Carter and Jim Peterson are
13 here, Co-Counsel of the McFarlane Defendants.

14 MS. EADS: I'm here in Massachusetts. My name is
15 Joan Eads. That's spelled E as in Edward, A as in
16 apple, D as in dog, S as in Sam. And the witness is
17 Dennis Kitchen, K-I-T-C-H-E-N.

18 MR. DENNISON: And Wyman Dennison.

19 MS. EADS: And Wyman Dennison is with me.

20 MR. MCFARLANE: This is Todd McFarlane, the
21 individual.

22 MR. SIMMONS: One more. This is Jeffrey Simmons
23 in Madison.

24 MR. KAHN: That's right. Sorry Jeffrey. And he
25 represents the plaintiffs as well.

1 MR. SIMMONS: Yes.

2 MR. KAHN: All right, Dennis, if you wouldn't
3 mind, long distance, if you raise your hand, the court
4 reporter here in St. Louis will swear you and we'll
5 begin the deposition.

6 DENNIS KITCHEN,
7 Of lawful age, being produced, sworn, and examined on
8 the part of the Defendants, deposes and says:

9 DIRECT EXAMINATION

10 BY MR. KAHN:

11 Q Dennis, why don't we start by having you state
12 your full name and give us your address for the record?

13 A Dennis Kitchens, 62 Sand Hill Road, and that's in
14 Shutesbury, Massachusetts.

15 Q Dennis, we're here today to take your deposition
16 directed to an expert witness report that you prepared
17 and submitted and signed. It was dated July 22nd, 2002.
18 And so that you'll know what we're referring to, here in
19 St. Louis, we've had the court reporter mark that report
20 as Deposition Exhibit 201. Do you have a copy of your
21 report up there before you?

22 A Yes, I do.

23 Q Very good. And also for the record, the only
24 other exhibit that we are marking today is a deposition
25 exhibit that I believe Jeff Simmons is faxing up to you

1 so you know what it is when you get it, is a comic book
2 bibliography that is several pages long that we printed
3 off of the Neil Gaiman website, www.nielgaiman.com, and
4 it's entitled, "Neil Gaiman Bibliography, Part II, The
5 Comics," and it lists about 10 or 12 pages worth of
6 comic books. And when that arrives in the conference
7 room, that would be Exhibit 202.

8 MS. EADS: We do not have that currently.

9 MR. SIMMONS: Jeff Simmons here. Joan, Brenda is
10 faxing that out right now.

11 MS. EADS: Okay.

12 Q (By Mr. Kahn) Dennis, why don't we start with a
13 little background information for us. Could you
14 summarize your educational background?

15 THE WITNESS: Graduated from the University of
16 Wisconsin, Milwaukee in 1968 with a degree in
17 journalism.

18 Q Any further degrees after that?

19 A No.

20 Q How old are you, Mr. Kitchen?

21 A 56.

22 Q Are you married?

23 A Yes.

24 Q Any children?

25 A Yes.

1 Q Your Expert Witness Report, which is marked as
2 Exhibit 201, begins by giving some of your background
3 and your personal experience. And my question for you,
4 sir, is can you compare for us how the Kitchen Sink
5 Press is similar to and different from a publisher such
6 as D.C. Comics or Marvel Comics?

7 A Sure. The most obvious would be the size.
8 Kitchen Sink Press was a much smaller publisher, and it
9 was a creative friendly publisher. D.C. Comics, as I'm
10 sure you know, is a division of AOL Time Warner, while
11 Marvel is experiencing problems and is in Chapter 11,
12 they're also a much larger company and they specialize
13 in what would generically be known as superhero comics.
14 I specialize in more idiosyncratic comics. Those would
15 be the most obvious differences.

16 Q Does Kitchen Sink Press publish superhero comics?

17 A Well, you had should use past tense. Kitchen
18 Sink Press is no longer in business. It published
19 characters like "The Spirit," which is a masked
20 character, "Megathon Man," which was a parody of
21 superheros. But as a matter of policy, I did not
22 publish superheros, per se.

23 Q You mentioned that the arrangements between
24 Kitchen Sink Press and the artists were -- I believe you
25 said more artist friendly?

1 A Yes.

2 Q And what do you mean by that?

3 A It means that in nearly all instances, the
4 creators owned the copyrights of the work they created.

5 Q And to your understanding, how was that different
6 than the way D.C. Comics and Marvel Comics handled
7 creators with the superhero comics?

8 A Yes. Traditionally, they own all of the property
9 that they publish and the creators work for them on a
10 work-for-hire basis.

11 Q What is your understanding of a work-for-hire
12 basis, sir?

13 A Under copyright law that the creator, the writer
14 or the artist signs away their copyright in exchange for
15 compensation, knowing that the fruit of their labor is
16 owned by the person they're doing the work for.

17 Q How is Dennis Kitchen Publishing different from
18 either D.C. Comics and Marvel or from your prior
19 publisher, Kitchen Sink Press?

20 A I would describe them as Kitchen Publishing at
21 this point as simply a hobby publishing house. I've
22 only done two books in the past year, and it's not
23 primarily motivated by profit. It's simply to keep my
24 foot in the industry, and I love publishing. But I
25 don't regard it as a means of making money at this point

1 in time.

2 Q You use the term publishing books, and just so
3 we're clear, when you say books, do you mean books or do
4 you mean comic books?

5 A The two books published by Dennis Kitchen
6 Publishing to date have been books, not comic books.

7 Q During the years that you operated Kitchen Sink
8 Press, did that publisher make an effort to market its
9 various publications?

10 A I couldn't quite hear the last part.

11 Q Did your prior company, Kitchen Sink Press,
12 during the time that you ran it make efforts to market
13 its publications?

14 A Of course.

15 Q And what kind of marketing efforts did Kitchen
16 Sink Press engage in?

17 A Well, that's a pretty broad question. We relied
18 on the distributors that were available in the direct
19 market. We relied on mail order catalogs, the Internet,
20 exports, anything that was available to us.

21 Q How did those marketing efforts differ in your
22 experience from the marketing efforts by D.C. Comics and
23 Marvel Comics during the same period?

24 A I'd say the two significant differences were they
25 utilized newsstand distribution, which I did not. And I

1 had a mail-order catalog, which I don't believe they
2 ever utilized.

3 Q Are you familiar with the monthly publication
4 that I believe is either published by or goes under the
5 name of "Diamond?" And I think it's a publication that
6 goes to newsstands or comic book stores.

7 A Do you mean "Diamond Previews."

8 Q Yes. "Diamond Previews."

9 A Yes. I'm familiar with that.

10 Q Is "Diamond Previews" a marketing vehicle that
11 Kitchen Sink Press used?

12 A Yes. Except for the one year or so in which
13 Kitchen Sink Press was exclusively allied with Capital
14 City Distributions. Other than that, yes, I used
15 Diamond from its inception.

16 Q And if you were to describe the way that you used
17 Diamond from its inception versus the way that D.C. and
18 Marvel Comics used it, how would you make that
19 comparison?

20 A Well, essentially the difference would come from
21 market clout. D.C. in particular has a special
22 relationship with "Diamond" in which it has the prime
23 real estate in that monthly publication. It has the
24 majority of the cover space and the promotional space
25 within it. And I understand from news accounts, D.C.

1 has the option to acquire "Diamond" in the near future.

2 And so those are significant differences.

3 Q And I've looked through a few issues of that
4 publication and noticed that Image Comics and D.C.
5 Comics and Marvel Comics seem to have sections within
6 each issue where they advertise their upcoming comic
7 books. Is that something Kitchen Sink Press was doing
8 as well?

9 A Yes, it did, although it had less prominent real
10 estate, in principle, it was doing the same thing.

11 Q And do you believe that marketing efforts can
12 have a significant impact on the sale of a particular
13 comic book?

14 A Certainly.

15 Q Can you think of any examples, I mean good
16 examples as you think back over the years of an
17 effective marketing effort on a particular comic book or
18 series of comic books?

19 A Well, marketing encompasses a number of things.
20 Certainly if you're including advertising, I've
21 certainly seen instances where more aggressive
22 advertising resulted in higher sales, but that seems
23 like common sense. I'm not sure what your point is.

24 Q I think that's fine. I want to briefly also
25 discuss two other aspects of your background that you

1 mentioned in Exhibit 201. One is your career as a
2 cartoonist, and the other is your career as a writer and
3 editor.

4 A Sure.

5 Q What was "Mom's Homemade Comics?"

6 A That's a comic book that I wrote myself, I drew
7 myself, and I published myself, and I distributed myself
8 back in 1969.

9 Q Was this what you would call one of either an
10 underground comic or an alternative comic?

11 A Yes.

12 Q And is that the same also for your weekly
13 syndicated strip for alternative and college papers?

14 A Well, that wasn't a comic book. That was a
15 newspaper strip. You mean was it an alternative? Is
16 that your question?

17 Q No, you know what. You actually clarified that.
18 I didn't notice that it was -- I see you have it here
19 stated as a syndicated strip.

20 A Yes.

21 Q Have you ever had any experience as a cartoonist
22 in the area of superhero comics?

23 A No.

24 Q Have you ever had any experience as a cartoonist
25 or an artist in a comic book that you would consider

1 comparable to "Spawn Comics?"

2 A Comparable, no.

3 Q And let me ask you the same question in your
4 experiences as a writer. Have you ever done any writing
5 for a superhero comic?

6 A Very briefly. I was once a guest contributor to
7 "The Badger", and I've done guest shots in "The Spirit",
8 and there are a few examples like that, but I wouldn't
9 regard those as being true work experiences.

10 Q Let me move now to the section in your report
11 where you talk about the data and the other information
12 that you've considered. You mention five documents
13 which we have actually in other depositions marked as
14 deposition exhibits. And I don't know whether your
15 attorney there has copies of the deposition exhibits
16 themselves.

17 MR. KAHN: Joan, do you have those?

18 MS. EADS: I believe we have copies of the
19 particular items mentioned on Page 2. We also have
20 received the fax from Jeff that you referred to earlier.

21 Q (By Mr. Kahn) I just want to make sure so that
22 we're all clear for the record, Dennis, if you could
23 take a look at the deposition exhibits that your
24 attorney has that were previously marked, and compare it
25 to this list of letters and faxes and internal memos

1 which you identify in Page 2. I have an exhibit
2 that's marked as Exhibit 2, which is a May 5, 1997, two-
3 page faxed letter from Neil Gaiman to Todd McFarlane.
4 And is that exhibit the same document that you are
5 referencing in the first bullet point under the data and
6 other information considered?

7 THE WITNESS: Yes. I believe it is.

8 Q And let's move to the second item, which is a
9 7/15/97 fax. Is that fax the same as what we have
10 marked as Exhibit 19?

11 A Yes. It appears to be.

12 Q Then there is another 7/15/97 fax. It's a letter
13 from McFarlane to Gaiman. And would you compare that to
14 what we've marked as Exhibit 20?

15 A Yes. The handwritten letter I believe, yes.

16 Q Yes. And then there is in your bullet points
17 another fax of that same date, July 15, 1997, and this
18 is from Neil to Todd. And we have an exhibit that seems
19 to match that description that's been marked as
20 Deposition Exhibit 33, and is that is --

21 A Give us a moment. It's not apparent.

22 MS. EADS: It doesn't look like we have that one.

23 MR. KAHN: If you don't have that one, I can
24 describe what our exhibit looks like and you can look at
25 the --

1 THE WITNESS: Oh, yes. I believe we have it.

2 This is the handwritten one from Neil?

3 Q (By Mr. Kahn) Yes. It starts off, "Dear Todd,
4 Hurrah ..."

5 A Yes. We have that now.

6 Q Okay. That's Exhibit 33. And then you also make
7 mention of a July 6th, 1998 memo from Bo Smith to Todd
8 McFarlane, and we have one that's marked Exhibit 129.
9 Is that the same document?

10 A Yes, it is.

11 Q You also mentioned in this section on the Data
12 and Other Information Considered that you reviewed what
13 you described as relevant portions of Mr. Gaiman's
14 Stardust contract with D.C. Comics. Do you see that?

15 A Yes.

16 Q What were the relevant portions for your report?

17 A I believe I only referred in there to the royalty
18 sections. That's my recollection.

19 Q And why did you believe the "Stardust" contract
20 would be relevant to your report?

21 A My recollection is that Neil Gaiman made
22 reference to it in his discussions with Todd as being an
23 agreement that was favorable to him and one that he
24 expected to be matched or exceeded.

25 Q What did the "Stardust" contract cover?

1 A I believe it was the "Stardust" graphic novel
2 that he cocreated with Charles Vest.

3 Q And is it your understanding that Neil Gaiman
4 owned the copyright in that comic book?

5 A I don't specifically recall because I didn't look
6 at that portion.

7 Q Okay. So you were looking principally at the
8 royalty provisions?

9 A That's correct.

10 Q In connection with your duties as an expert
11 witness in this case, or prior to that time in
12 connection with anything you did, have you had an
13 opportunity to review any D.C. Comics contracts other
14 than that "Stardust" contract for Neil?

15 A Yes, because I've been involved in copublishing
16 with D.C. And I've also, as an agent, dealt with D.C.
17 representing other talent.

18 Q And have you in either dealings with D.C. on your
19 own behalf or in representing other talent had an
20 opportunity to review D.C. Comics contracts for writers?

21 A Not specifically writers, no.

22 Q For whom have you -- or what types of D.C. Comics
23 contracts have you reviewed?

24 A For example, Will Eisner is a client, and I
25 brought his pre-existing library of graphic novels to

1 D.C. And there was a contract on that. Did a separate
2 contract to bring Will Eisner's "Spirit" character to
3 D.C. for a series of 20 or so archive editions. And in
4 this case, Will Eisner was both the writer and the
5 artist, so there was no separate writer agreement. And
6 these were pre-existing materials. Subsequent to those,
7 we brought two newer graphic novels, and again, Will
8 Eisner was the sole creator. So there was no separate
9 writer component.

10 Q And on those newer graphic novels, were those
11 novels that were written specifically for D.C. Comics
12 pursuant to those contracts?

13 A They were not created for D.C. They were offered
14 to D.C. In other words, Will Eisner created them
15 without knowing who had published them.

16 Q Got you. Have you ever seen a D.C. Comics
17 contract for a writer or an artist for an ongoing comic
18 book?

19 A Not other than this "Stardust" contract, no. Not
20 specifically.

21 Q Did Neil Gaiman show you any of his own D.C.
22 Comics contracts in connection with your duties as an
23 expert witness?

24 A No. I didn't ask him for that.

25 Q And he did not offer them to you; did he?

1 A No, not specifically.

2 Q In your expert witness report, you mention you
3 have an hourly rate of \$124 an hour. I assume that
4 means that you are --

5 A Did you say \$124?

6 Q I'm sorry. \$125 an hour. Pardon me. I assume
7 that means that you are keeping track of the time you
8 are spending or the time that you spent in researching
9 and preparing this expert witness report?

10 A Correct.

11 Q And what is the total time that you spent in
12 researching and preparing the actual witness report that
13 we've marked as Exhibit 201?

14 A I don't remember the specific number of hours,
15 but I remember the last invoice, but not the exact
16 number of hours.

17 Q How many invoices have you sent?

18 A Just one to date.

19 Q And what was the amount of that invoice?

20 A \$3,500.

21 Q Did that invoice include any costs in addition to
22 your time?

23 A Actually at the time I billed that, I did not
24 have all of my receipts at hand, and so I did not
25 include them. That included some transportation, but it

1 was relatively negligible and I didn't think it was
2 important enough.

3 Q So that first invoice was principally for your
4 time?

5 A It was entirely for time.

6 Q And that amount was \$3,500, sir?

7 A Right.

8 Q So if I divided \$125 into that number, we would
9 have a pretty good number of the hours that you've spent
10 on researching and preparing the report?

11 A Correct.

12 Q Is there any further research or investigation
13 that you intend to do in connection with your duties as
14 an expert witness in this case?

15 A Well, this morning I was handed a fax that
16 included some numbers I hadn't seen earlier on sales of
17 the "Spawn" "Angela" comics and trade paperback. I just
18 saw that about an hour ago. So I would probably want to
19 update the report to include that information.

20 Q How would that information be relevant to your
21 report?

22 A Because it wasn't available earlier and it shows
23 numbers specifically for "Angela" books that were not
24 available.

25 Q Other than updating your report with those

1 numbers, is there any other research or investigation
2 that you planned on doing in connection with your duties
3 as an expert witness in this case?

4 A There certainly may be. At this moment I can't
5 be more specific.

6 Q Well, is there any further research or
7 investigation that you believe you might be doing?

8 A At this moment, no.

9 Q Mr. Kitchen, how long have you known Neil Gaiman?

10 A I can't recall the exact year, but I'm sure we
11 met at some convention or another going back 10 years or
12 so. I didn't know him well for a long time. I can't
13 say that I know him well now, but I've known him for
14 roughly a decade.

15 Q How would you describe your relationship with
16 him, and let's first start at the personal level. Are
17 you friends?

18 A I would regard him as an industry friend, yes.

19 Q And how would you describe an industry friend?

20 A Someone that I know through the industry.

21 Q Before this lawsuit got filed in January this
22 year, how often would you and Neil communicate with each
23 other about industry matters or as industry friends?

24 A My principal contact with Neil in recent years
25 has been through the Comic Book Legal Defense Fund,

1 which is a 501C-3 nonprofit organization devoted to
2 defending First Amendment rights in the comics industry.
3 That's an organization that I founded in 1986 and
4 continue to chair. And Neil was -- I'm not sure the
5 exact year, but several years ago he joined the Board.
6 Prior to that he was a significant fundraiser for the
7 fund, and virtually all of my communication with him
8 would have been through the CBLDF.

9 Q When did Neil join the Board?

10 A I can't remember the precise year, but I'm going
11 to guess about three years ago.

12 Q How often does the Board meet?

13 A It meets face to face once a year, but we have
14 periodic telephonic conferences.

15 Q How many members are on the Board?

16 A At this moment eight.

17 Q Who are the other members?

18 A I take it back. We just added a ninth. Do you
19 want me to list the names right now? That would be
20 myself, Neil, Frank Manguracina, Milton Greek, Chris
21 Spiros, Louise Nemschaff, Greg Ketter, John Davis. I
22 seem to be forgetting one person. You'll have to
23 forgive me.

24 Q That's okay. I will forgive you. Has Neil
25 spoken either to you or to the Board about any money

1 that the comic book legal defense fund might receive as
2 a result of this lawsuit?

3 A Could you please repeat that question?

4 Q Sure. Has Neil Gaiman spoken with you or with
5 the Board as a Board about any money that the comic book
6 legal defense funds might receive as a result of this
7 lawsuit?

8 A No, never. That subject has never come up.

9 Q Has he ever mentioned that he would donate any
10 recovery he might receive from this lawsuit or from the
11 publication of "Miracle Man" to the Comic Book Legal
12 Defense Fund?

13 A No. Never came up.

14 Q We've talked about your personal relationship
15 with Neil, which is as an industry friend. Have you or
16 your companies had any business relationship with Neil?

17 A I'm hesitating because there were a couple of
18 things that I think were discussed, but no, I don't
19 think specifically I ever did any business with Neil,
20 other than -- well, I can think of one exception. He
21 was a contributor to "The Spirit, The New Adventures."
22 He wrote a story called "Mink Stole", which was
23 illustrated by -- sorry, I'm tongue tied at the moment.
24 He wrote a story for "The Spirit."

25 Q Was that a single issue of "The Spirit" that he

1 wrote a story for?

2 A No. It was a contribution to an anthology.

3 Q Was that anthology published as a book?

4 A It was a color comic book.

5 Q When was that comic book published?

6 A Probably 1998.

7 Q And just so I have my terminology correct, when
8 you say that that was published as a comic book, was it
9 the length of a typical comic book, or was it much
10 longer?

11 A A typical comic book.

12 Q How many other writers were involved in that
13 comic book?

14 A Probably three.

15 Q And Neil's story about the "Mink Stole" appeared
16 as a separate story within the comic book?

17 A Correct.

18 Q How many issues of that comic book were sold?

19 A Eight.

20 Q Was that comic book marketed generally to the
21 public?

22 A Only through "Diamond" and mail order, and the
23 marketing outlets we discussed earlier. Everything but
24 newsstands.

25 Q And a total of eight issues of that particular

1 comic book were sold?

2 A Well, that series. That was a series with a
3 variety of contributors.

4 Q Okay. And this particular issue of that series,
5 this particular comic book itself, how many copies were
6 sold?

7 A I would guess about 30,000 to 35,000.

8 Q How did those sales compare with the other seven
9 issues of that comic book?

10 A They were all in the similar range. They all
11 featured star creators, and I don't think any stood out
12 from the rest. This particular series, because it was
13 an homage to a highly respected creator, Will Eisner, it
14 attracted the top talent in the industry.

15 Q Who were the other writers who contributed who in
16 your opinion were stars?

17 A Allen Moore, for example. Curt Busiek.

18 Q Would you spell his last name?

19 A B-U-S-I-E-K.

20 Q Okay.

21 A Those are the ones that come to mind offhand.

22 Q But it's your testimony that there was a star
23 from each of the eight comic books?

24 A Well, I'm including artists as stars. For
25 example, Dave Gibbons, Mark Schultz, Bill Stout. Again,

1 I don't have the series in front of me. So I'm just
2 recalling some names that pop into my mind.

3 Q To give me some sense of what 30,000 copies means
4 in 1998 --

5 A To Kitchen Sink Press that was a good solid
6 number, given that the market was quite weak at that
7 point and my company was quite weak. It was the last
8 year of its existence and it was on a shaky financial
9 basis. So there was not any appreciable marketing
10 budget for that series or anything I was doing at that
11 point in time.

12 Q Do you know what comparable sales were during
13 1998? And as I look through Exhibit 202, for something
14 that Neil had wrote called "Stardust" 1, 2, 3, and 4,
15 which seems to be published during the 1997/98 period
16 for D.C. Comics. Do you know what those sales were?

17 A I wouldn't offhand, no.

18 Q During the 1998 period, do you know what the
19 sales of the typical issue of a popular D.C. Comics
20 comic book were?

21 A I wouldn't offhand.

22 Q But that's something you could look up?

23 A Certainly, using the earlier reference book one
24 could determine that. And just from conventional
25 knowledge, I could hazard a guess. But I certainly

1 wouldn't be privy to those numbers.

2 Q Okay. Other than this one issue of "The Spirit"
3 that Neil participated as a writer for Kitchen Sink
4 Press, have you had any other business relationship with
5 Mr. Gaiman?

6 A I don't believe so. There was at one point a
7 script he'd written for a series I'd published called
8 "Cherry." But I don't believe that was ever published.
9 I lost the rights to that series, so I don't believe
10 there was ever a contract entered into. And unless I'm
11 mistaken, I don't recall any other business transaction.

12 Q Who approached you in this case about the
13 possibility of becoming an expert witness?

14 A Joan Eads.

15 Q And is this something that Neil had raised with
16 you before Ms. Eads talked to you?

17 A No, he did not.

18 Q When did Joan Eads approach you?

19 A Do you remember Joan?

20 MS. EADS: I'm not the witness.

21 THE WITNESS: Several months ago.

22 Q (By Mr. Kahn) Did she at the time tell you what
23 areas of expertise they were interested in having you
24 opine on?

25 A I believe it was as a general expert witness to

1 help explain to a jury how the comic book industry works
2 and to explain terminology and common practices.

3 Q Going back to the other data and information that
4 you considered, you mentioned a conversation you had
5 with Neil Gaiman regarding his right to produce one-
6 offs. Did you discuss anything else with Mr. Gaiman
7 besides his right to produce one-offs?

8 A No. It was a very focused conversation. I
9 wanted to just clarify something with him.

10 Q What did you want to clarify?

11 A My reading of the documents regarding the one-
12 offs didn't make it completely clear to me that it was
13 comic books and a collection of graphic novel of them
14 referred to a comic book project as I recall, and I just
15 wanted to make sure that in his mind that it was both
16 comic books and a collection. I presumed that was the
17 case, but I wanted to make sure it was his
18 understanding, and he did confirm that. That was the
19 sole purpose of the conversation. And in fact, that's
20 the only time I've spoken to him during the period of
21 time I've been the expert witness. I've had no other
22 communication with him.

23 Q Let me ask you and your attorney to look at
24 what's been marked as Deposition Exhibit 19, which is
25 Neil's letter, typed letter to Todd, dated July 15,

1 1997.

2 A Yes, I have that.

3 Q And there is a paragraph about two-thirds of the
4 way down the page that I will read into the record, and
5 then I want to ask you if that is the paragraph that you
6 wanted to call Neil about to discuss one-offs. The
7 paragraph reads, "That I have, exclusive of any other
8 'Angela' projects I might do with the Todd McFarlane
9 Division of Image, the right to a one-off 'Angela'
10 comics project, and a one-off 'Medieval Spawn' project
11 on each of which I would keep 100% of the revenue.
12 That if these are team-up projects, they could go to
13 other comic companies, but if they exclusively feature
14 the character in the title, I agree to do them with
15 Image, although not necessarily with you."

16 A Yes. I believe that is one. And I believe there
17 was also another letter that made reference two projects
18 without being as specific.

19 Q I'm not aware of -- at least among the documents
20 you identified, any other reference in correspondence
21 between Neil and Todd. I suppose there is one, perhaps
22 there is a reference to that in the Bo Smith memo, which
23 is Exhibit 129.

24 A Yes. That may have been it as well. I don't
25 recall specifically at this moment. But I just wanted

1 to clarify that it was a miniseries that would be
2 collected into a graphic novel.

3 Q And why did the term one-off make you believe
4 that it would be a miniseries as opposed to a one comic
5 book project?

6 A I think the word project, and the fact that logic
7 told me that if Neil was negotiating to get this
8 compensation in exchange for "Miracle Man" and other
9 considerations, that he would maximize it, and as a
10 publisher and creator myself, I certainly would have
11 done both. And I just wanted to clarify that he was
12 thinking the same thing.

13 Q Did you ask him at the time when you were
14 discussing this with him why he did not use the term
15 miniseries?

16 A I did not.

17 Q Let me ask you this, Dennis. Is the term one-off
18 a term of art within the comic book world?

19 A It's not in any dictionary, but it's a term used
20 often enough, yes.

21 Q By whom is it used?

22 A People in the industry.

23 Q And I ask you this because I've also heard the
24 term one-shot. Have you heard that term?

25 A Yes. In my opinion and in my experience, one-

1 shot usually refers to a singular book, a single comic
2 book or a single project. One-off to me is a broader
3 definition that encompasses more than a single title.

4 Q If you know, what is the etymological origin of
5 the term one-off?

6 A I do not. It's a slang term used in the
7 industry, and as I said earlier, you won't find in the
8 dictionary.

9 Q So if I understand your testimony, you read this
10 letter, Exhibit 19, which had this reference to a one-
11 off "Angela" comic project and a one-off "Medieval
12 Spawn" project, and you called Neil to confirm your
13 belief that this was referring not to what you've called
14 a one-shot, but was, in fact, referring to a miniseries.

15 A Essentially, yes.

16 Q And Neil told you that it was?

17 A Yes.

18 Q What else did Neil tell you during that
19 conversation that you've described as a focused
20 conversation about his plans or efforts to bring the
21 one-off projects to life?

22 A Honestly we did not discuss it in any detail
23 whatsoever. I told him I was working on the expert
24 report and I wanted to make sure that my interpretation
25 of the project was his. He confirmed that. It was a

1 fairly brief conversation, no more than five or ten
2 minutes.

3 Q Later in your report, and we'll get to this.
4 We'll try to do it in order. You actually have some
5 specific estimates and descriptions of two separate one-
6 off miniseries projects, one of which is a "Batman
7 Medieval Spawn," and the other is an "Angela Phoenix"
8 miniseries. Where did you come up with the titles for
9 these two?

10 A From the testimony or from the materials that I
11 reviewed.

12 Q Where did you see a reference to an "Angela
13 Phoenix" miniseries?

14 A It must have come from Neil's deposition in which
15 he talked to Marvel. That's my best recollection.

16 Q And just so that we're all clear, in your actual
17 conversation with Neil, did you discuss with him any of
18 his conversations or negotiations with either Marvel or
19 D.C. Comics for doing these one-off projects?

20 A It may have come up. I mean, I don't remember
21 specifically. Obviously, I got those combinations
22 either from the phone conversation or from the materials
23 that I've read. Obviously, the correspondence between
24 Todd and Neil makes reference only to "Medieval Spawn"
25 and "Angela," but it leaves open the possibility of team-

1 ups. And so the team-ups, which I refer to as
2 crossovers here are based specifically on the "Phoenix"
3 character from Marvel and "Batman" character from D.C,
4 which would have had to have come from Neil since he is
5 the one who attempted to make those publishing projects
6 happen.

7 Q And other than his deposition, did Neil tell you
8 anything about his efforts to make these two projects
9 happen?

10 A I don't believe so, no.

11 Q And I take it, since it's not mentioned here,
12 that you did not attempt to discuss these projects with
13 any representative of D.C. Comics or Marvel Comics to
14 see whether they would be willing to do such a team-up
15 project with Neil?

16 A I did not.

17 (A short recess was taken.)

18 Q (By Mr. Kahn) Mr. Kitchen, in your conversation
19 with Neil Gaiman in connection with his duties as an
20 expert witness, has he advised you of any role or
21 involvement of Marvel Comics in this lawsuit?

22 A You're asking me if Neil brought this up?

23 Q Yes.

24 A No. That subject was not discussed.

25 Q And has anyone else involved on Neil's side of

1 the case talked to you about any role that Marvel Comics
2 is playing in this lawsuit?

3 A No. It has not come up.

4 Q In addition to conversations that you had that
5 you identified in your Data and Other Information
6 Considered section of Exhibit 201, did you have an
7 opportunity to have any discussion with any other expert
8 witness retained by the plaintiffs in this lawsuit?

9 A I have had conversations with a gentleman named
10 Jim Cavin, who I believe has been retained to determine
11 damages.

12 Q How many conversations did you have with
13 Mr. Cavin?

14 A A couple of very brief ones. I'd say we had a
15 couple of substantial conversations.

16 Q Were those telephone conversations?

17 A Could you please repeat that?

18 Q Were those telephone conversations?

19 A Yes, they were. I've never met him.

20 Q So you had a couple brief ones and a couple
21 substantial conversations with him?

22 A Yes. In other words, I've had several, a couple
23 of which were just I think trying to arrange times to
24 speak.

25 Q Tell me about the substantial conversations.

1 A Would you mind repeating the question?

2 Q Sure. Tell me about, beginning with the first
3 one, your first substantial conversation with Mr. Cavin.
4 And by that I mean, tell me roughly when it took place,
5 how long it lasted, and what you talked about.

6 A To the best of my recollection, it was several
7 weeks ago, and it focused primarily on industry
8 definitions. He just wanted to clarify that he
9 understood some of the terms, royalties, sliding scales
10 various things that were applicable here. I got the
11 impression he wasn't -- certainly wasn't familiar with
12 the comic book industry and perhaps publishes. I'm not
13 sure. We mostly discussed terminology.

14 Q During that conversation, did you discuss one-
15 offs and miniseries?

16 A I'm sure it came up, yes.

17 Q Did he ask you to send him anything?

18 A No.

19 Q And did you send him anything?

20 A No.

21 Q About how long did that conversation last?

22 A I'm going to guess 20 minutes.

23 Q And it was mainly going through different terms
24 in the industry, and by that I mean royalties, sliding
25 scales, one-offs, miniseries, things like that?

1 A Yes. It was a general conversation on how it
2 typically was handled, and I think he just wanted to be
3 comfortable that he understood what the physical product
4 was and how -- I believe we discussed returnable versus
5 nonreturnable markets. That was something he needed
6 clarification on. I had to explain that or clarify that
7 royalties only applied to books or comics actually sold,
8 and that in the returnable system, a good deal of those
9 books were destroyed and royalties didn't apply. Things
10 like that.

11 Q Do you recall anything other than industry
12 terminology during that first substantial conversation?

13 A Well, not really. I didn't take notes, and I
14 don't recall anything more specifically.

15 Q Tell me about the second substantial conversation
16 with Mr. Cavin.

17 A More recently, a week or so ago, he called to ask
18 me if there was another way to approach Neil Gaiman's
19 revenue sharing here. I had gone on the assumption that
20 Neil would be compensated by Marvel or D.C. on a royalty
21 basis. And he asked if it could also have been done on
22 a profit share basis. And in fact, I told him that that
23 was an alternative and that, in fact, I probably should
24 have mentioned it earlier. The team-up comics, the
25 crossovers are typically done on a profit share basis

1 publisher to publisher. And in discussing this with
2 Mr. Cavin, I realized that, in fact, there was no reason
3 why Neil could not have inserted himself in the one-offs
4 as essentially the other publisher. And so he discussed
5 the possibly of calculating an alternative method of
6 compensation.

7 Q And do you know what method of compensation he
8 ultimately decided to use?

9 A No. It was very general. It was just a concern
10 that, in fact, that was a valid precedent, and I
11 confirmed that it was.

12 Q And how did you personally know that?

13 A Know that that was a typical way of doing it?

14 Q Yes.

15 A I've been involved in copublishing, and
16 specifically with D.C, and I know they're structured in
17 my experience as a 50/50 profit split.

18 Q Do you recall anything else you discussed in the
19 second conversation with Mr. Cavin?

20 A I think that was the primary focus.

21 Q Anything else you recall?

22 A Not offhand.

23 Q Did you take notes at that conversation?

24 A No, I did not.

25 Q And the other conversations you had, beyond

1 simply setting up times for the substantial
2 conversations, do you remember anything of substance in
3 these other conversations with Mr. Cavin?

4 A I don't think so.

5 Q Mr. Kitchen, prior to this lawsuit, had you ever
6 been retained in a lawsuit to serve as an expert
7 witness?

8 A No, I have not.

9 Q Have you ever written any articles for
10 publication on any of the topics that you have offered
11 your expert witness on in this report?

12 A Well, that's a broad question. I've written a
13 lot of articles over the years.

14 Q I would think more to the extent that they exist
15 within the comic book industry, what we would call
16 scholarly articles.

17 MS. EADS: Objection as to form. Answer if you
18 can.

19 THE WITNESS: I've written a lot of articles over
20 the last 30 years that some of which could be regarded
21 as scholarly, I think, yes, historical, state of the
22 art, all kinds of topics. So I hope that's helpful.

23 Q (By Mr. Kahn) Have you written any articles,
24 scholarly or otherwise on which you described in your
25 report as the star system?

1 A Not specifically, no.

2 Q And help us understand what you mean when you say
3 not specifically.

4 A In other words, I haven't written articles
5 specifically about the star system.

6 Q Have you written articles that have discussed the
7 star system?

8 A I don't think it would have been relevant in any
9 of those articles.

10 Q So that answer is no?

11 A I believe it would be, yes.

12 Q You believe, yes; it would be no?

13 A In other words, I have not specifically written
14 about the star system other than in this report.

15 Q And I assume that you've written no articles on
16 the topic of one-offs?

17 A That's correct.

18 Q Let me ask you now in your exhibit, which is
19 Exhibit 201, your report, to turn to the bottom of Page
20 2 under the Summary of Expected Testimony, to the first
21 subheading, which is Capsule History of the Comics
22 Industry.

23 A Yes.

24 Q Which is a five-paragraph capsule history,
25 correct?

1 A Yes.

2 Q What is this based on?

3 A Based on my observations and my readings
4 throughout my career. The purpose is to just try to
5 summarize. As it says, it's a capsule history.

6 Q I mean, there are no sources cited for these five
7 paragraphs, and based upon your age, some of the events
8 took place before you were born. So I'm wondering what
9 material you actually relied upon in writing this?

10 A Well, again, you could have a very long answer to
11 that, but I would say to begin with, I've been closely
12 associated for the last 30 years with Will Eisner, who
13 was, in fact, there at the birth of the comic book
14 industry, and I've had countless discussions with him
15 about the origin and history of the comics industry. So
16 one of my closest friends and associates in the industry
17 was there. And most of this is based on my having read
18 a number of accounts and having talked to people who
19 were there. I don't think anything that's written here
20 is controversial. I think it's based upon fact.

21 Q Is the language that appears here your own
22 language, or is this taken from other sources?

23 A This is entirely my own language.

24 Q You mentioned in the last paragraph something
25 that begins I guess with a speculator boom in the early

1 90's, and then a decline in sales after that. Could you
2 describe that in a little more detail for us?

3 A The speculator boom?

4 Q Well, both the boom, and what period is covered
5 by the decline.

6 A Well, in my experience and my observation,
7 starting about 1993 industry sales began tapering off
8 after previously showing considerable growth. So it's
9 been, again, based on reports in various trade
10 publications, there's been a steady and measurable
11 decline in comic sales.

12 Q And has that steady and measurable decline
13 continued through today?

14 A I couldn't quite hear that. Could you please
15 repeat it?

16 Q Sure. Has that decline, which you described here
17 as steady, has that decline in sales which began in
18 1993, 1994, continued through today?

19 A Actually the past year or so there's been some
20 evidence of it bottoming out. There still seems to be
21 some debate on that. But, hopefully for the industry's
22 sake, it has bottomed out.

23 Q So from an overall comic book sales perspective,
24 were I to compare let's say the top 10 selling comic
25 books in 1993 with the top 10 selling comic books in

1 1996, would you expect that the sales would be lower in
2 '96 than they were in '93?

3 A Absolutely.

4 Q And would you expect the sales would be lower in
5 1999 than they were in 1996?

6 A Yes, I would.

7 Q And that would continue until the last year or
8 so?

9 A Yes.

10 Q And I assume that that decline in sales would not
11 simply be the top selling comic books. It would be
12 across the board?

13 A Correct. I'm talking overall, because there are
14 certainly occasional exceptions, occasional blockbusters
15 that could skew the top seller list, but not the overall
16 trends.

17 Q Let's turn to the second section, which is
18 entitled Creative Rights. And actually before we start
19 on that section, what is your understanding, based on
20 your conversations with the plaintiff's lawyers and your
21 own investigation, the relevance of your "Capsular
22 History of the Comic Book Industry" to this lawsuit?

23 A As I said at the beginning, when I spoke to Joan,
24 she thought it was important that I be able to convey
25 some background to presumably a jury. And so I felt it

1 was important for someone who's not familiar with the
2 comics industry to understand its brief history and how
3 we got to the point, because particularly I think it's
4 relevant to creator's rights. I wanted the
5 nonprofessional to understand how the industry has
6 evolved.

7 Q Okay. Now, let's shift to Creator's Rights,
8 which is No. 2, and it begins on Page 3 of Exhibit 201.

9 A Yes.

10 Q And there are some date references that go as far
11 back as the 1930's. And I assume that's based either on
12 your conversations with Mr. Eisner or others who were
13 there then, or your readings during that period?

14 A Correct. And it's also basis in fact. Any of
15 the books published from that period are clearly owned
16 by the publisher. There were no creator-owned comic
17 book properties in the 1930's or for a number of years
18 afterwards.

19 Q The last paragraph of this section talks about
20 something that occurred in the late 1980's that
21 culminated in a document called a "Bill of Rights for
22 Comic Creators." And I want to ask you something about
23 that. Were you among the group of comic book creators
24 that convened and wrote that document?

25 A No, not at all.

1 Q Do you know who was?

2 A I know some of the names. I wasn't there. I
3 know Scott McCloud is probably the primary architect. I
4 believe Steve Visset was part of it. And I'm trying to
5 remember. Someone I think told me Larry Martyr was part
6 of it. Another Vermont artist, I can't think of his
7 name at the moment, but again, I wasn't there. I saw
8 the documents. And since I was principally a publisher
9 when that came out, I would not have been invited. I
10 would have been regarded as part of the enemy in the
11 most general sense.

12 Q And is it your understanding that Todd McFarlane
13 was not a part of this group of comic book creators who
14 wrote this document?

15 A To my knowledge he was not.

16 Q And what about Neil Gaiman? Was he part of that
17 group?

18 A I don't recall hearing his name associated with
19 the formation of it, no.

20 Q So at some point out of this meeting of these
21 comic book creators who include some of the names you've
22 mentioned here, Scott McCloud, Steve Visset, and others,
23 a document called a "Bill of Rights for Comic Creators,"
24 comes out, correct?

25 A Yes.

1 Q What happens to that document after it comes out?

2 A Well, as I noted in the report, it was widely
3 circulated in the industry. It simply, as I said here,
4 it was -- it reflected the ongoing struggle between
5 those who published and those who created. And I simply
6 cited in that context that it wasn't regarded as gospel
7 by anyone other than perhaps the ones who wrote it. And
8 even then I think they regarded it as a somewhat
9 idealistic set of goals that most people in the industry
10 would not have accepted in the literal sense. But from
11 a scale of, you know, 1 to 10, 1 being the publishers
12 have complete control, and 10 being creators have all
13 the control, this would certainly be a 10. And in my
14 view, somewhere around 5 is where it makes sense to
15 enter into mutually profitable relationships.

16 Q Since the time that the "Comic Book Creator's
17 Bill of Rights" has been drafted, have other artists or
18 have any publishers signed on or formerly adopted it?

19 A I think not. As I said, I cited it only to show
20 the intellectual thought process that was going on among
21 a vanguard of creators that was articulate and very
22 active. There were many, many countless discussions
23 going on between individuals. Certainly at comic book
24 conventions, anywhere they were gathering, you know, one
25 of the burning issues of the day.

1 Q And to your knowledge, no mainstream comic book
2 publisher has ever adopted this, correct?

3 A If a mainstream publisher adopted this, I don't
4 think they would stay in business. As I said, I think
5 it's a very idealistic document, not a pragmatic
6 document.

7 Q Mr. Kitchen, let me ask you the same question for
8 this Section 2 that I asked you about Section 1, which
9 is, what is your understanding of the relevance of this
10 portion of your report to any issue in the lawsuit?

11 A Because creator's rights seem to be an essential
12 element in the dispute between Neil and Todd.

13 Q Okay. And how would the "Bill of Rights for
14 Comics Creators" be relevant to that?

15 A I don't see it in itself being specifically
16 relevant. I'm going to reread my report here. It says,
17 "It reflected the intellectual thought process of many
18 comic creators and underscored the ongoing debate and
19 struggle of creators' rights versus publishers' rights."
20 It was in this climate that Todd McFarlane left Marvel
21 Comics in 1991, etc. I think that's the relevance.

22 Q Have you ever had a conversation with Todd
23 McFarlane about the "Bill of Rights for Comic Creators?"

24 A No, I have not.

25 Q Do you know Mr. McFarlane?

1 A We've met. We played softball together one time.

2 Q When did you play softball together?

3 A In San Diego there was a long time tradition of a
4 softball game between publishers and artists on one side
5 and distributors and retailers on the other side. I had
6 been the captain of the publisher/artists team for a
7 number of years, and I heard that Todd had played semi-
8 pro ball, and so I recruited him to be a ringer for our
9 team.

10 Q Was he any good?

11 A He was great.

12 Q Other than playing softball with him, have you
13 had any other relationship with Todd McFarlane over the
14 years, either with Todd McFarlane or any of his
15 companies?

16 A I made an attempt to communicate with Todd some
17 years back and failed to elicit any responses from him.
18 So I don't know if you'd characterize that as a
19 relationship.

20 Q And what was that attempt to communicate with him
21 about?

22 A In my capacity as the Chair of the Comic Book
23 Legal Defense Fund, I sent him a fax asking if we could
24 use his "Spawn" character on a lunch box that would be
25 sold to raise money for the CBLDF, essentially asking

1 him for a free, one-time nonexclusive license. And I
2 did not get a response. And sometime later, sent a
3 follow-up fax asking if he'd gotten the earlier one
4 telling him that we were hoping he would cooperate and
5 did not get a response. And as I recall, I think I sent
6 a third fax saying: I just want to make sure that you
7 aren't too busy or were distracted, but I said: Your
8 failure to communicate, I presume is a negative. So I
9 won't bother you anymore. And that was to paraphrase.
10 I made several attempts and never got a response. And
11 other than that, I've had no interaction with Todd
12 whatever to my recollection.

13 Q And have you had any interaction with any of his
14 companies?

15 A A few months ago I, on behalf of a client my
16 agency represents, I wrote to his company asking for
17 some information regarding royalty payments. I didn't
18 deal with Todd directly. I dealt with a woman who
19 handles his royalty accounting. And I can't offhand
20 recall any other communications with his company.

21 Q And was that in connection with Mr. James O'Barr?
22 Was he your client?

23 A Yes, that's correct.

24 Q And what was the nature of your letter? Was it a
25 dispute with one of Todd's companies?

1 A No. I wouldn't characterize it as a dispute.
2 Our client believed that he was not paid what he was
3 supposed to have been paid under a pro licensing
4 agreement. And so I simply asked for clarification of
5 the accounting, and Todd's company was quite
6 cooperative. And based on what they provided, I believe
7 the client was incorrect in his conclusion. In his own
8 mind, his claim I think was incorrect and it predated my
9 representation of him. So I simply had to look at the
10 evidence.

11 Q And did the evidence make you believe that Todd's
12 company had actually paid your client the royalty your
13 client was due?

14 A Yes. I -- subject to any audit or anything, yes.
15 I'm convinced that he acted honorably.

16 Q Do you have any familiarity in either first hand
17 or what you've read of a lawsuit that Todd McFarlane and
18 his companies got involved with where they were sued by
19 a former professional hockey player name Tony Twist?

20 A I read the media accounts.

21 Q Was it your belief that there were any First
22 Amendment issues involved in that lawsuit?

23 A There might have been. And actually I think I
24 remember that the CBLDF discussed the fact that Todd
25 might even be approaching us. But I think, obviously,

1 he did not and he handled it himself and he prevailed as
2 I understand it.

3 Q And to your knowledge, did anyone from Todd
4 McFarlane or his companies or anyone from Image Comics
5 approach the Comic Book Legal Defense Fund in connection
6 with the Tony Twist case?

7 A No. To my recollection we were never approached.
8 The closest I can think of is that Larry Martyr was at a
9 CBLDF party, and he and I casually discussed it. But
10 there was no formal discussion of any kind.

11 Q And does the Comic Book Legal Defense Fund
12 normally operate that way? Mainly they wait to be
13 approached by somebody in the comic book world?

14 A We're a widely publicized organization, and our
15 800 number is posted everywhere in publications, store
16 windows, and so on. Standard procedure is people ask
17 for our financial assistance. And the board runs it by
18 an attorney who specializes in those cases, makes his
19 open recommendations, and the Board votes on whether to
20 support and to what extent it will provide support.

21 Q Mr. Kitchen, before you were retained in this
22 case to be an expert witness, were you at all familiar
23 with the "Spawn" comics?

24 A It would have been impossible not to be aware of
25 it.

1 Q And why do you say that?

2 A Well, certainly in our industry because it was a
3 best seller, because it spawned, so to speak, a lot of
4 media and publicized spinoffs.

5 Q Before you were retained for this lawsuit, were
6 you aware that Neil Gaiman had once written an issue of
7 "Spawn?"

8 A I was vaguely aware. It's not something I had
9 read.

10 Q And were you vaguely aware at the time that there
11 were some other guest writers during that same period
12 who wrote issues of "Spawn?"

13 A Yes, I was, because it was publicized, and to
14 that extent I was aware, yes.

15 Q Was it a novel marketing effort to have these
16 four guest writers to those issues of "Spawn?"

17 A Yeah. I thought it was actually a brilliant move
18 at the time.

19 Q How so?

20 A Well, that it served two purposes. It got free
21 publicity, and because it was a way of "Spawn" to
22 respond to a general criticism that the writing was a
23 weaker element in the publication. So they went out and
24 found the best writers he could. And I thought that
25 showed a certain sense of humor and marketing savvy.

1 Q And if I have read your report correctly, you've
2 at least reviewed the sales figures for those issues in
3 which there were guest writers?

4 A Yes.

5 Q And that marketing strategy paid off?

6 A Yes. I believe it showed a roughly 50% jump in
7 the issues done by the four writers.

8 Q That actually brings me to Topic 4 in your
9 report, which is the star system, which begins on Page 4
10 of Exhibit 201.

11 A Yes.

12 Q Now, other than your observations of the
13 industry, and that may be enough, what is this section
14 of your report based upon?

15 A Well, I think you just said it. It's based on my
16 observation and experience. It's what I would regard as
17 common knowledge in the industry.

18 Q I look at the third paragraph here where you
19 state in your opening sentence that a star's association
20 with a comic can be expected to add substantially to
21 bottom line profits on that comic. What is that
22 statement based on?

23 A Based on my experience as a publisher and from
24 talking to other publishers. Again, I think fairly
25 common sense statement. It would be analogous to a film

1 having a star and being more likely to attract viewers
2 into the theater. A star in a comic book results in
3 more people taking that comic off the shelf.

4 Q Other than your discussion in this expert report
5 of which you believe Neil's impact on the "Spawn" sales
6 with his Issue No. 9 as part of that four-writer group
7 of issues where the sales jumped you calculated
8 approximately 50%, have you done any other empirical
9 investigation into the impact that the star system has
10 in comic book sales?

11 A Well, it would be based on my own experience and
12 in talking to other publishers over the years.

13 Q Well, for example, have you looked at circulation
14 or sales numbers of Neil Gaiman's and other comic books
15 to determine what impact his name has on comic books
16 outside of "Spawn" comics?

17 A I'm not quite sure I heard that question
18 completely. Would you please repeat it?

19 Q Sure. Have you had an opportunity to look at any
20 sales or circulation numbers for other comic books that
21 Neil Gaiman has been involved with over the years to
22 determine what impact his name under your star system
23 description, what impact his name has on the bottom line
24 profits of those comic books?

25 A Well, I certainly wouldn't know the bottom line

1 profits, not specifically, but the same references I'm
2 sure could be referred to. My opinion is that largely
3 in talking to people at D.C. Comics who have told me
4 that Neil's name on books are pretty much guaranteed
5 success, but I'm not privy to the specific numbers.
6 That's proprietary.

7 Q But there are some numbers that are available in
8 reference books, correct?

9 A Yes, they are. It requires some extrapolation in
10 many cases because the Crowzy book I referenced utilizes
11 numbers that were taken from the archives of Capital
12 City Distribution, and you have to calculate their
13 approximate market share during the period you use them.
14 In other cases they have "Diamond's" preorder numbers,
15 but those aren't complete. So there are very few
16 instances in that book where there is an absolute,
17 positive, you know, number without any slight ambiguity.
18 But you can still extrapolate pretty closely.

19 Q Well, for example, let me ask you to look at
20 Exhibit 202, which is this Bibliography of Neil's. If
21 you look at Page 2.

22 MS. EADS: Just a minute.

23 THE WITNESS: We just got it so I haven't looked
24 at it at all.

25 Q (By Mr. Kahn) That's okay. What I did is I

1 looked through it to try to find examples of what
2 appeared to be special writing projects by Neil roughly
3 during the same time period. And I look at one on Page
4 2. It's a "Batman Black and White, No. 2."

5 A Okay.

6 Q I think which is a D.C. Comics publication in
7 1996. What source could you go to to test your
8 hypothesis that Neil would have a 50% impact on the
9 sales of "Batman?"

10 A I couldn't say that it would have a 50% impact on
11 "Batman." What I said in my report was that the numbers
12 showed a 50% impact on "Spawn". As a general statement,
13 I would say that Neil's name on any comic would improve
14 its sales. But I never broadly said it would be 50% on
15 anything. I imagine there are some books that would be
16 a smaller percentage. And I imagine there are some
17 books he could double in circulation, but I couldn't
18 tell you offhand what it would have on a single title
19 that you point out.

20 Q I'm just trying to find out how we could go ahead
21 and test your theory of his impact under the star
22 system. And if we took this as an example, this,
23 "Batman Black and White, No. 2," what resources could we
24 go to to determine what impact, if any, his name had on
25 the sales of that comic book?

1 A Well, in an ideal world, you would get the
2 numbers from D.C. Comics.

3 Q And how about in the real world?

4 A Then you would have to rely on known distributor
5 information.

6 Q And I assume, because it's not mentioned in your
7 report, that you did not attempt to do that for any
8 other publications for which Neil Gaiman wrote single
9 comic books or miniseries, correct?

10 A That's correct.

11 Q You mentioned some of the other stars when we
12 were talking earlier about your star system, and we can
13 just go with Allen Moore and Frank Miller who were both
14 writers in this early "Spawn" issue, and who, along with
15 Neil, were in that group where the circulation went up
16 50%. Have you attempted to test your star system theory
17 with any other publications by Allen Moore or Frank
18 Miller?

19 A I wasn't asked to do that.

20 Q So your answer is no?

21 A Correct.

22 Q Now, you state that during this time period, and
23 this is the second paragraph of your Star System
24 section. And I quote, "That Neil Gaiman was one of the
25 biggest stars among comic book creators during the time

1 of this dispute." And then you go on to make some
2 additional statements on that topic in the rest of that
3 paragraph. And other than what you've set forth in that
4 paragraph, do you have any other basis for stating that
5 Neil Gaiman was one of the biggest stars in the comic
6 book industry during the time of that dispute?

7 A Well, sure. He was the subject -- he was a guest
8 at many conventions where I saw very long lines. He was
9 the subject of a lot of interviews and media attention
10 when I had many occasions to go to the D.C. offices to
11 conduct business, and I know he was treated very
12 reverentially there. In other words, he was treated
13 like a star. When the CBLDF had a fundraising cruise
14 four years ago, Neil was one of the first people we
15 approached to be on there because of his star
16 attraction. That was before he was on the Board. So I
17 mean, there are countless examples of --

18 Q Okay. Well that's good. And you don't need to
19 give me all of them, but I understand where you're
20 coming from. During this period of time --

21 A I can give you one example that's rather unusual.
22 He donated his leather jacket for an auction and it
23 raised about \$12,000. So I mean, essentially he's the
24 comic book equivalent of a rock star.

25 Q Okay. During this period, and let's call it 1992

1 to 1996, "Spawn" was being published by Image Comics,
2 correct, for the most part, throughout most of that
3 period?

4 A You're asking me?

5 Q Yes.

6 A If "Spawn" was published by Image?

7 Q Yes.

8 A Yes.

9 Q Yes. So you're somewhat familiar with Image
10 Comics where it fits into the constellation of comic
11 book publishers?

12 A Sure.

13 Q Was Image Comics a larger publisher or a smaller
14 publisher than D.C. Comics?

15 A Smaller than D.C.

16 Q Would it be fair to say it was much smaller?

17 A Depends on what you mean by much. Marvel and
18 D.C. obviously dominate, but Image was among that second
19 tier, and it was in that cluster of what I would call
20 middle-sized publishers.

21 Q Are you familiar during that time period with a
22 comic book series that Neil Gaiman was the principal
23 writer of for D.C. Comics called, "Sandman?"

24 A Yes.

25 Q In fact, if we look at Exhibit 202, which is

1 arranged alphabetically by title, it appears that
2 "Sandman" begins, number one, back in 1989, and runs at
3 least through 1995. And that was a comic book series
4 published by D.C. Comics, correct?

5 A Yes.

6 Q Do you know what the approximate circulation
7 numbers were for "Sandman" during the time that Neil
8 Gaiman was the principal writer for that series?

9 A Not offhand, no.

10 Q Do you know approximately how the "Sandman"
11 circulation numbers compared to some of the biggest
12 selling titles during that period of time?

13 A I haven't done a comparison so I cannot tell you
14 specifically, no. I only know that D.C. was very happy
15 with it and it would appear that it was a very
16 successful title for them.

17 Q And according to you, Neil Gaiman was the
18 equivalent of a rock star within the comic book world?

19 A As a personality, yes. He was treated as one.
20 And I also say that because at conventions a
21 disproportionate number of female fans were always
22 milling about. I mean, he had a certain strong cult
23 following is the only way to describe it. I say the
24 equivalent of a rock star because, as you may not be
25 aware, most cartoonists are generally speaking more

1 nerdish types as well as the writers. And so the fact
2 that he has a certain persona and a certain manner of
3 dressing and speaking makes him stand out from the
4 crowd, and it adds to that what I would call rock star
5 persona.

6 Q Do you have any knowledge of how the "Sandman"
7 sales figures during the 1993 to 1996 period compared
8 with the "Spawn" sales figures?

9 A I don't know, but I would suspect "Spawn" outsold
10 it. That's only my guess.

11 Q And do you believe that "Spawn" outsold it even
12 when Neil Gaiman was not writing for "Spawn"?

13 A Honestly I'd have to look it up. I'd rather not
14 speculate on that.

15 Q Would you have an explanation if it turns out
16 that "Spawn" was consistently outselling "Sandman"
17 during that period after Neil stopped writing for
18 "Spawn," why "Spawn" would continue to outsell a comic
19 book title published by D.C. Comics featuring one of the
20 biggest stars in the comic book world?

21 A I would suppose because of the media push behind
22 "Spawn", the fact that there was the animated show, the
23 movie, the toys, and the fact that it was a central
24 character with a costume as opposed to "Sandman," which
25 is more mythological and did not have a TV show or media

1 push behind it.

2 Q Now, are you aware that during the same time
3 period Neil wrote a three-issue miniseries for Todd
4 McFarlane Productions featuring the main character
5 "Angela?"

6 A I'm aware of it, yes.

7 Q And trying to apply your star system to those
8 issues in that miniseries, how would you expect the
9 sales of that miniseries to compare with the sales of
10 "Spawn" itself during that same period?

11 MS. EADS: Could you repeat that, please?

12 Q (By Mr. Kahn) Sure. Taking the sales figures
13 for the "Angela" miniseries, those three issues being
14 written by Neil Gaiman under your star system theory and
15 opinion, Mr. Kitchen, how would you expect the "Angela"
16 sales to compare to the "Spawn" sales during that same
17 period?

18 A If his name was exploited properly and all things
19 being equal, I would expect there to be an impact.

20 Q Would you expect the "Angela" miniseries issues,
21 assuming that his name was exploited properly, to be
22 outselling the "Spawn" comic book issues during that
23 same period?

24 A Not necessarily, because "Spawn" was an
25 established best seller with a name recognition that

1 "Angela" did not have. And without having done
2 personally any marketing survey, the character "Angela"
3 may not have been properly -- may not have been as well
4 known. "Spawn," for example, I think I mentioned in my
5 report that the "X Men" series was a best seller for
6 Marvel. But the spin-offs of "X Men" sold considerably
7 less. Basically it's the flagship title series, just
8 like "Spiderman," "Batman," all of the primary
9 characters have spin-offs, and publishers try to exploit
10 them. But there is a flagship title that really anchors
11 the sales, and my observation is that the "Angela" with
12 a spin-off wouldn't have done as well as the flagship,
13 but I would say that Neil associated with a spin-off
14 would have made it sell better than a comparable spin-
15 off by a nonstar.

16 Q And have you had an opportunity to test that
17 opinion by looking at actual sales data?

18 A I went through the book that I have in front of
19 me, the catalog. And I did make some general
20 observation, but I did not apply empirical data, no.

21 Q I mean, I assume there would be many factors and
22 many variables that would affect sales, correct?

23 A Well, yes, including things like the cover artist
24 and the subject of the cover, timing, promotion. There
25 are all kinds of factors. It's very hard to completely

1 generalize.

2 Q Okay. And so the actual cover art could have a
3 major impact on the sales of an issue?

4 A Well certainly, because the star system doesn't
5 just apply to writers, it applies to artists. I think
6 there are probably a few ordinary comic titles out there
7 that if Todd McFarlane had done a guest cover, you would
8 have seen a jump in sales because a certain number of
9 his fans would have wanted it. Those are the kinds of
10 marketing tricks and devices publishers and editors are
11 always trying to do. You try to get your best
12 combination of writer and artist. And since there is
13 only a handful of stars, you make do with your ordinary
14 talent in most cases.

15 Q And I think you also mentioned that the
16 marketing campaign would have an impact on sales?

17 A Well, that's what logic would say, yes.

18 Q And that would be another variable or another
19 factor?

20 A Certainly.

21 Q That you'd need to include in whatever study you
22 made?

23 A In a proper study, yes. You'd try to analyze all
24 those factors.

25 Q In continuing on to Section 5, which is entitled,

1 Neil's Right to Author One-offs.

2 A Yes.

3 MR. EADS: Mike, this is Joan Eads. It's 2:00
4 here and the witness is actually getting a little
5 hungry. If you're going to be finished in about half an
6 hour, I'd say we go on, but it doesn't look like to me
7 you will be.

8 MR. KAHN: I mean, I can't speak for anybody else
9 on the line. I don't think I have more than about a
10 half hour. That could be famous last words.

11 MS. EADS: I just don't want the witness to faint
12 on us.

13 MR. KAHN: Well, no. I certainly don't. And we
14 can handle this, Joan, any way that you want. I know
15 you wanted to get out of there.

16 MS. EADS: Well, it's up to the witness really.
17 Would you like to take a break and get a quick sandwich
18 and then come back?

19 THE WITNESS: No. If it's less than an hour, I'm
20 happy to continue right now.

21 MR. KAHN: Do you want to take a five minute
22 break or do you want to proceed?

23 THE WITNESS: Well, we didn't have lunch and I
24 wasn't sure if we'd be getting a snack here or something
25 soon. Five minutes would be good.

1 (A short recess was taken.)

2 Q (By Mr. Kahn) Dennis, we are back on the record
3 and I just had some more questions I wanted to try to
4 get the answers to on the remaining portion of your
5 report. Was Neil Gaiman the person who told you in this
6 conversation that his concept of the one-offs were to be
7 a three or four issue miniseries of "Batman," "Medieval
8 Spawn" and a three or four issue miniseries of "Angela
9 Phoenix?"

10 A No. I believe I described earlier in the report
11 that a miniseries typically is three to four issues and
12 there are sometimes, you know, two issue miniseries and
13 conceivably longer ones, but three or four is by far the
14 most common. And Neil did not seem to have in mind
15 whether it was three or four, just that it was a
16 miniseries. And so as I stated, I believe the -- I'm
17 looking for the paragraph here, but basically that was
18 the only place I took what I would consider an
19 aggressive position. I based it on the assumption that
20 he would want to maximize his opportunity on a one-off,
21 and on everything else I tried to err on the
22 conservative side.

23 Q Right. And this one you said you assumed
24 although he was talking three to four, he would do all
25 four?

1 A Yes.

2 Q And my question is actually simpler than that,
3 Dennis. Did Neil tell you in his conversation with you
4 he was planning to do a three to four?

5 A No he used the term miniseries.

6 Q Okay. And you said there had been two issue
7 miniseries, but the more common ones are three to four
8 issues?

9 A Correct.

10 Q And that's Dennis Kitchen's interpretation of
11 what Neil Gaiman meant when he said miniseries?

12 A Yes. In that single instance, I took a more
13 aggressive position because if I were Neil Gaiman and I
14 saw this as an opportunity for economic compensation, I
15 would want to get that extra issue in there. And so
16 yes, I made that conclusion. In other words, it was
17 ambiguous and that's how I interpreted it. And every
18 other instance where there was a choice, I took a
19 conservative position.

20 Q And just so I'm clear. In your conversation with
21 Neil, he actually used the term miniseries, or he just
22 used the term one-off?

23 A When I was clarifying that project, that one-off
24 project meant miniseries and graphic novel collection.
25 He confirmed that, yes, it was miniseries and the

1 collection. That was the purpose of that call.

2 Q Okay.

3 A I did not -- I mean, I suppose you could say I
4 could have or should have at that moment asked him if
5 the miniseries was a particular number. I in my mind,
6 and I think if you ask the average person in the
7 industry, a miniseries would be three or four issues.

8 Q And forgive me if this is a stupid question
9 coming from someone who's not as familiar with the comic
10 book industry as you. If Neil was thinking of a two-
11 issue miniseries, would there also be a trade paperback
12 collection?

13 A Not likely. It would have been too thin. And
14 it's not unprecedented, but, you know, you'd be talking
15 about a 56 page book or something. You'd barely get a
16 square spine around that.

17 Q And so then if it was a one-issue series or a
18 one-issue project, there definitely would not be a trade
19 paperback collection, correct?

20 A Well -- correct.

21 Q Okay. Like I said, it could be a stupid
22 question, but I just needed to clarify it. In this
23 section, which is No. 5 in your report, you talk about
24 your 50% impact by going back and comparing sales
25 numbers for "Spawn" issues 2 through 7, and then

1 comparing them with the four issues by the star writers,
2 and then stating, "After the impact of the guest writers
3 crested (you go on to state) that the orders on 'Spawn'
4 quickly declined to prestar levels and below." Do you
5 actually -- do you have those numbers written down
6 somewhere of what these different orders were?

7 A I don't have that book with me today, but I
8 remember that after the 50% jump, there were a handful
9 of issues that stayed in that range, and then it dropped
10 back to the pre guest writer numbers. My conclusion on
11 that was that, obviously, the novelty effect wore off,
12 and then the core readers were there.

13 Q And then as you mention earlier, one would expect
14 from that point on the sales to continue to decline as
15 they were across the board in the industry?

16 A Yes. And I think without having it in front of
17 me, that was the case even with "Spawn", which was
18 regarded as certainly one of the more successful titles.
19 It certainly didn't maintain numbers that it had during
20 that period of time. I don't have them in front of me,
21 but I do remember observing the decline.

22 Q Based on your conversation with Neil and your
23 review of the deposition and the documents, what is your
24 understanding of the time frame in which Neil was going
25 to publish these one-off projects?

1 A My understanding is that he would do it as soon
2 as he could put together the deal. Normally there was a
3 gestation period of nine months to a year, in my
4 experience on a project, once you decide to do it. So
5 that's as close to an answer as I can give you.

6 Q I mean, you say gestation period. You mean once
7 you've actually signed the deal, it then takes nine
8 months to a year to get it onto the newsstands?

9 A Right. Now, some will take longer if they are
10 more complex. But assuming Neil delivered the script in
11 a timely manner, and his collaborator was identified and
12 was available and so on, there is a number of variables,
13 it would be tough to do in a short period of time.
14 Could have taken longer.

15 Q And what is your experience as to how long it
16 would take to put together that deal?

17 A Well, that's a loaded question. I would say
18 given that Neil had a very good relationship with D.C.
19 and had already a template in place contractually, that
20 would have taken very little time at all. I'm not sure
21 what his professional relationship was with Marvel, but
22 I suspect that Marvel would have been very eager to work
23 with Neil just because of his reputation and known
24 appeal. In my own experience, depending on the attorney
25 and depending on, you know, whether there are

1 distractions, you can do a deal in a couple weeks. You
2 can do it in a couple months. They can take longer, but
3 that's the normal range.

4 Q Other than what you've already testified to and
5 the documents you reviewed, you don't know whether Neil
6 was actually negotiating to put these two deals
7 together, correct?

8 A All I know is that he approached them and when
9 they called Todd for confirmation that Neil had the
10 right, there was a nonresponse. That's my knowledge.

11 Q And where did you gain that knowledge?

12 A It must have been from the depositions with Neil.

13 Q And do you know who Neil approached at either
14 D.C. Comics or Marvel Comics?

15 A I do not. I was not privy to that.

16 Q One of the documents you mentioned you looked at
17 is one we've marked as Exhibit 129, which is the Bo
18 Smith memo to Todd?

19 A Yes.

20 Q Did that indicate to you that at least as of
21 July, 1998, Neil's deal with D.C. Comics had not been
22 finalized to do a "Medieval Spawn" "Batman?"

23 MS. EADS: John, give the witness a chance to
24 look it over.

25 Q (By Mr. Kahn) Okay.

1 THE WITNESS: Okay. I've reviewed it. Your
2 question was?

3 Q Does that indicate to you that at least by July
4 of 1998 this first step in doing the one-off project,
5 namely signing the deal with D.C. Comics, had not yet
6 happened?

7 A Yeah. I certainly could conclude that, yes. And
8 do you have any idea of what Neil's time frame for doing
9 the deal with Marvel was?

10 A No. I only know from his deposition that he was
11 very frustrated that they could not get a confirmation
12 from Todd or his company that this was, in fact,
13 something he was permitting. They kept to the essence
14 of this I guess, which was Neil thought they had a deal,
15 and Todd concluded that he didn't want to go ahead. I
16 can't tell you more than that because I wasn't privy to
17 who Neil was talking to.

18 Q Using your gestation period and deal period, was
19 it likely, based on what you know, that these one-off
20 projects would have come out in the year 1999 had they
21 been able to go forward?

22 A I don't have my notes in front of me, but I
23 believe my conclusion was it would have come earlier. I
24 think I based it on the initial correspondence here, the
25 earlier documents from July of '97, thinking that if

1 they had come to an essential agreement here, that in
2 approximately a year, perhaps the fall of '98, I thought
3 was a realistic time line. Not much earlier. It
4 certainly could have stretched into '99.

5 Q And that really would just depend on whatever
6 deal the parties were able to strike, correct?

7 A Well, yes. I mean -- yes.

8 Q Right. In other words, you don't have any
9 independent knowledge of where those deals were at other
10 than this brief conversation you had with Neil, the
11 depositions you reviewed, and these documents we've
12 identified that you looked at?

13 A Correct. I have no other independent
14 information.

15 Q Do you know who Paul Levitz is at D.C. Comics?

16 A Yes, I do.

17 Q Based on what you've reviewed, would you be
18 surprised to know that Mr. Levitz has testified that he
19 has no memory of any such "Batman" "Medieval Spawn" deal
20 being discussed at D.C. Comics?

21 A Not necessarily, because he's at the very top of
22 that company. And in all likelihood, Neil would have
23 been talking to mid level people.

24 Q And my understanding is in your discussion of the
25 "Angela Phoenix" crossover, which is at the bottom of

1 Page 5, this is a title that as near as you can recall
2 you saw referenced in Neil's deposition?

3 A It could only have come from his deposition or a
4 phone conversation, and I believe it's the former.

5 Q Have you negotiated any deals with Marvel Comics?

6 A Not in many years. I worked for Marvel in the
7 1970's. I haven't had any business with them since.

8 Q So you would have no basis for knowing how long
9 it would take Marvel Comics to do such a deal, correct?

10 A No. But I do know from other observers who have
11 written about the two companies recently, that Marvel
12 actually moves much more quickly. It's less
13 bureaucratic and it has the ability to turn on a dime,
14 which is one reason it's had a market advantage of late.
15 So I would surmise from that, that in fact, they might
16 even be faster than D.C. The only reason I said earlier
17 I thought a deal with D.C. would go quickly is that
18 there was a pre-existing relationship.

19 Q And this stuff that you've read and heard about
20 Marvel, does that apply to the Marvel of the year 2002
21 or the Marvel of the year 1997?

22 A Well, the specific article I recall was "The
23 Comic Buyers' Guide," an article by Brian Hibbs, that I
24 believe was based on his visit to both offices -- would
25 have been the Christmas of 2000 as I recall. And he is

1 a fairly prominent retailer, and he visited both
2 companies and met with the heads of both companies. And
3 then he wrote an article, front-page article, in which
4 he compared the styles of the company. And having not
5 been in Marvel's offices in many years, I am basing it
6 in part on his observations and from, you know,
7 conversations that get mentioned and so forth and people
8 who deal with Marvel. And D.C. is without any question
9 a more layered bureaucratic company.

10 Q In your discussion of your efforts to try to
11 project the sales for a "Medieval Spawn" "Batman" one-
12 off project in Subsection A on Page 5 of Exhibit 201 --

13 A Yes.

14 Q -- you talk about a conversation you had with
15 Michael Martin, Vice-president of Marketing with Dark
16 Horse?

17 A Yes.

18 Q In which he tells you a certain number of copies
19 of each issue would have been shipped to newsstands on a
20 returnable basis and he tells you what the sell through
21 would be of 17% to 20%, and these are numbers I assume
22 that you used in coming up with your estimates?

23 A Yes. And again, I assume that they were
24 conservative numbers because Dark Horse probably has the
25 least clout on newsstands as any of the comics

1 publishers do. But it was a -- it was the only
2 information I was able to get. This is ordinarily
3 regarded as pretty proprietary.

4 Q And I guess that's my next question. Other than
5 these examples that Mr. Martin gave you, did he actually
6 give you the actual numbers?

7 A Yes, he did.

8 Q Because here it says he told you that 60,000 to
9 80,000 copies of each issue would have been shipped on a
10 returnable basis with a 17% to 20% sell through. And
11 then you take averages from that. Did he actually give
12 you the numbers? That is, did he give you the actual --

13 A He gave me that range. In other words, he didn't
14 say 70,000, he said 60,000 to 80,000, and that was based
15 on his best recollection. And I think, frankly, he was
16 uncomfortable going and getting the exact number because
17 he would have required his superior's permission, and I
18 think he was doing this as a favor to me and did not
19 want to go so far as to go into the files and pull the
20 exact numbers. He gave me a range for the purpose of
21 this analysis.

22 Q Okay. And I guess, Dennis, that was my only
23 question was that he didn't give you the actual numbers
24 for those issues; is that correct?

25 A That is correct.

1 Q And based on your experience in publishing, the
2 actual numbers would exist somewhere, correct?

3 A Yes. Either the publisher or the distributor
4 would have those, or both.

5 Q And let me ask you similar questions for the
6 "Angela Phoenix." When you're trying to put together
7 numbers, you come up with some specific numbers for some
8 comparative ones --

9 A Right. This is the "X Men Alpha Flight?"

10 Q Right. I see here you had Diamond preorders of
11 60,000 to 65,000 copies per issue?

12 A Right.

13 Q Reorders would add at least 5% to those?

14 A Right.

15 Q And you said there would be a certain drop off.
16 Did you have any actual numbers?

17 A The numbers, the Diamond preorders came from the
18 Crowzy catalog we referenced earlier. The 5% comes from
19 my personal experience in talking to other publishers as
20 kind of a minimal overrun, in other words, the risk a
21 publisher takes when he establishes a print run. You
22 can order from your printer exactly as many books as you
23 know your distributor orders, or you can overprint and
24 hope you'll sell them. A conservative edition is 5%.
25 If you're bullish about a book, you may pick any

1 percentage beyond that. And I and other publishers
2 have. But it's rare to print exactly as many as your
3 distributor's preorders would indicate.

4 Q Okay. Here was my question, and try and
5 understand. At the top of Page 6 you say that this two
6 issue, "X Men Alpha Flight," you said you had "Diamond"
7 preorders of 60,000 to 65,000 copies per issue?

8 A Yes.

9 Q Where do you get -- I mean, that is not an exact
10 number. That's an estimate, correct?

11 A Yes. What I believe I did was I took the two
12 numbers that were in the catalog that were in that
13 range, and rather than I guess bore people here with
14 something like 62,763 and the other, I just took the
15 general range since this was an attempt to find an
16 analogous miniseries, that was a good round number
17 range. If we went to the catalog, if you have that, you
18 can find out yourself by looking it up.

19 Q And then if I understand it, you come up with an
20 estimate of an additional 14,800 sales per issue based
21 on --

22 A This is based on Dark Horse's numbers because I
23 want privy to Marvels, and I was comfortable doing that
24 very conservatively because I knew if anything I would,
25 you know, come close to betting the bank on this, that

1 Marvel has more clout in the marketplace, and probably
2 would have shipped probably more books, but certainly
3 probably at a better sell through because their
4 trademark is much more recognizable in the general
5 market. So again, I stress these are conservative.
6 Without being privy to their exact numbers, this is the
7 best I could do to come up with some analogous book and
8 a projected sales.

9 Q Got you. And the Dark Horse numbers that you
10 reference, those are the numbers that you've got in that
11 telephone conversation where you were actually giving
12 sort of round numbers without being given exact numbers?

13 A The newsstand numbers were, yes. The "Diamond"
14 numbers would have come from the catalog.

15 Q Right. And I was only referring to these
16 newsstands, which have you estimating an additional
17 14,800 sales per issue?

18 A Right. Which is not a great deal, but you know,
19 that's not considered a profit center for most
20 publishers. That's one reason I never dealt with
21 newsstands.

22 Q And then you raise everything by this 1.333 sales
23 impact formula for Gaiman's name factor?

24 A Right. Again, that was averaging the percentages
25 referenced earlier.

1 Q The 25% to 50%?

2 A Right.

3 Q And that was based, if I understand you
4 correctly, entirely on the circulation numbers that you
5 observed for "Spawn" issues 2 through roughly 14 or 15,
6 correct?

7 A Well, in part, in part. We know that was 50.
8 And I --

9 Q Well, my only question is, you've done no other
10 attempt to quantify Neil's impact on a particular title
11 of a comic book series, correct?

12 A I did not. And it certainly could be done. I
13 think --

14 Q Okay. I have one other area which will be very
15 brief. This goes back to something you mentioned
16 earlier, and then we'll be done, although maybe somebody
17 else will have some questions. You mentioned earlier,
18 Dennis, that you'd written a lot of articles over the
19 years. When I'd asked you if you'd written any
20 scholarly articles, you said you'd written a lot of
21 articles and some of them could have been considered
22 scholarly. Which ones that you wrote would you consider
23 to be scholarly?

24 A Well, that's a relative term. I would most
25 recently, for example, Dark Horse put out a two-volume

1 series on the collective "Little Annie Fannie" by Harvey
2 Kurtzman and Will Elder. I wrote the introduction. I
3 wrote all of the annotations to those. Those I would
4 regard as scholarly. I'm doing the same for a series of
5 "Li'l Abner" books based on Sunday strips from 1954 to
6 1961 by Al Capp and Frank Prezeda. Those I would regard
7 as scholarly in that they are very specific in nature.
8 They're based on a lot of historical data and political
9 and cultural information. And the audience for those
10 are relatively small and esoteric. That I consider
11 scholarly. If I did something in more of a general
12 publication, I would be less inclined to call it
13 scholarly. That's a relative term.

14 Q Are there either in academia or otherwise, are
15 there scholarly or academic publications or periodicals
16 devoted to the comic book world?

17 A There are professors at various colleges who
18 write books and articles. And yes, they appear -- I
19 don't think there is one specifically devoted to
20 scholarly research in comics. If there is, it's pretty
21 obscure. But for example, I can't think of the exact
22 name of it. It's basically the pop culture association
23 that comes out of I think Ball State in Indiana. They
24 have a periodical, and articles in it will from time to
25 time be about comics, but they'll also be about pop

1 culture in general.

2 Q And are these of a more academic or scholarly
3 nature?

4 A Sure. By definition these are academics who are
5 contributing to it.

6 Q Have you ever contributed articles to that
7 publication?

8 A No. I'm not a professor and I'm not a member of
9 that association.

10 Q And over the years, have you written and had
11 published any scholarly or academic journal, any
12 articles about the comic book world?

13 A I'm not sure I understand your question. Could
14 you repeat it?

15 Q Sure. We've talked about this pop culture
16 focused academic periodical that's published by Ball
17 State. And my question to you is, other than that
18 particular publication, are there any other publications
19 that you would consider to be scholarly or academic in
20 nature that have published any articles by you?

21 A I would say no. I have written for trade
22 publications, more popular publications than
23 specifically academic publications.

24 Q Which trade publications have you written for?

25 A Most recently I've done articles in "Comics

1 Buyers' Guide," for example. I've done them in the past
2 for "Comics Journal." Gosh, I mean, I don't know that I
3 can recall all of them over the years. It's been a long
4 time. Probably some that are no longer in publication.
5 Wrote a lot for my own publications such as
6 introductions and so forth. I mean, basically that's
7 the whole point of my being an expert here is based on
8 30 years of raw experience. And I don't claim to be a
9 professor.

10 Q In looking through your expert report, by subject
11 number under Summary of Expected Testimony where you
12 have five separate subjects beginning with Capsule
13 History of the Comics Industry --

14 A Yes.

15 Q Going back to your description of some of the
16 industry publications, "Comics Buyers' Guide," "Comics
17 Journal," and others, can you just briefly tell me
18 whether you have published articles on any of these
19 subjects? And you can take them one at a time.

20 A Have I published books on the subjects?

21 Q Yes. Either books or articles, beginning with
22 Topic 1, which is a Capsule History of the Comics
23 Industry.

24 A Sure. I published a two-volume set called
25 "Century of Comic Strips" that cover literally the first

1 hundred years of the media. I published "The Definitive
2 Book on the Yellow Kid," which is regarded as the first
3 popular comic strip.

4 Q You know, I may have asked that the wrong way.
5 What I meant to ask is, have you written articles or
6 books that have been published of these topics, not
7 whether you as a publisher have published them?

8 A No. I'm not an author of books other than my own
9 comics. The articles I've written have been, again, for
10 trade publications or introductions to books that I've
11 either published or someone else has published. I don't
12 claim to be an author.

13 MR. KAHN: Well, I have no further questions,
14 Mr. Kitchen. Thank you for sitting here. And I'll turn
15 this over to anyone else that may have any questions and
16 I will shut up.

17 THE WITNESS: Okay.

18 CROSS EXAMINATION

19 BY MR. FELDMANN:

20 Q This is Scott Feldmann. Unless other counsel
21 prefer to go first, I have I would estimate several
22 minutes worth of questions if you want to proceed to try
23 to wrap those up?

24 A Sure.

25 Q Okay. Mr. Kitchen, you mentioned you had some

1 discussions with the other expert, Mr. Cavin; is that
2 correct, about this case?

3 A Yes.

4 Q Did you discuss appearance fees with Mr. Cavin?

5 A No, not at all.

6 Q Did you ever discuss with him what the value of
7 using Mr. Gaiman's name in connection with a comic book
8 or trade paperback might be?

9 A I don't specifically recall that that came up,
10 no.

11 Q Do you have a general recollection of discussing
12 with Mr. Cavin the value of Mr. Gaiman's name?

13 A He may have made -- I mean, he obviously has read
14 my report, and I think there was a general discussion,
15 but I can't recall that specificity.

16 Q Did you discuss with him the value of using an
17 author's biographical information in connection with
18 publishing a trade paperback?

19 A No. We absolutely didn't discuss that.

20 Q Do you have an opinion as to whether or not using
21 an author's biographical information on a book would
22 increase sales of that book?

23 A By biographical information, you're talking about
24 having a capsule paragraph about them or their photo on
25 a back cover or something of that effect?

1 Q Well, excluding the photo, just a narrative
2 description of prior publications and other works,
3 whatever general biographical information that a
4 publisher might choose to use.

5 A In my personal opinion, I don't think that would
6 have a significant impact.

7 Q Can you quantify that in a range? Would that be
8 less than 20% or nonmaterial impact at all, 0%?

9 A The author's name on the cover has a significant
10 impact. The biographical information itself -- I mean,
11 obviously, depending on the author, you know, there may
12 be a factor. But the paragraph itself on the back cover
13 is not what I would consider something with major
14 marketing impact.

15 Q What would your opinion be in terms of any
16 incremental sales would be due to using biographical
17 information about Mr. Gaiman in addition to using his
18 name, not including the value of the name, just the
19 information on a trade paperback?

20 A Well, I think from a publisher's point of view,
21 it would just be smart marketing to take advantage of
22 the name recognition. And then if a consumer heard the
23 name but wasn't sure who he was, speaking as a consumer,
24 I often will go to the back and just see if that's who I
25 thought it was or if there was an added motive for me to

1 pick up that book or buy it. So it's a secondary
2 marketing tool. I would not regard it as a primary
3 tool.

4 Q Okay. Well, taking your opinion that using
5 Mr. Gaiman's name has value, and let's just specify in
6 terms of percentages. Let's just say that 100% of the
7 value that is used is due to the use of Mr. Gaiman's
8 name, his photograph, and his biographical information.
9 How would you attribute percentages to those three
10 categories in terms of whatever value is added in terms
11 and a percentage?

12 A The name on the cover and the photo on the back
13 and a bio on the back, those are the three?

14 Q Sure.

15 A I would say the name on the cover was by far the
16 most important. In terms of breaking it down by
17 percentages, that's pretty abstract. I would certainly
18 rank the name first, the photo second, and depending
19 on -- I would say in Neil's case, since he is photogenic
20 and has a significant female readership, that the photo
21 would be the most important second factor, and the bio
22 third.

23 Q Well, would it be fair to say, and correct me if
24 I'm wrong, that you assign a zero percentage weight to
25 the biographical information then?

1 A No, not zero, but I would rank it third.

2 Q Well, could it be as much as 30% then?

3 A Boy, that's tough to say. If you force me to
4 pick a number, I would say more like 20 or so.

5 Q Approximately 20%. And then what percentage
6 would you give weight to the photo?

7 A Again, in Neil's case, I would say it's another
8 25% or 30%.

9 Q The balance being the name?

10 A Yeah. The name clearly is on the front cover.
11 It's what causes you to pick it off the shelf. It's
12 only after you pick it off the shelf that the secondary
13 elements might urge you to take it home and read it or
14 put it back on the shelf.

15 Q Now, as an expert in the comic book industry,
16 have you come across information about what various
17 authors might be paid as a personal appearance fee say
18 at a comic book signing?

19 A It varies a great deal. I know some who might do
20 it for free, and I know others who get thousands of
21 dollars.

22 Q What would be the upper end?

23 A Understand that I'm not in the business of
24 booking artists at conventions, but I'm familiar --
25 Robert Krohn, for example, I know was enticed to come to

1 a Chicago convention for \$5,000. And that was some
2 years ago. And typically creators are paid a fee plus
3 transportation if they're regarded as a star attraction.
4 A lot of them go on their own. And I'm not sure that I
5 can answer. I'm not an expert in that particular area.

6 Q Well, is it your experience that artists are
7 sometimes paid a separate amount of money for use of
8 their name in connection with a book as opposed to just
9 a royalty basis?

10 A Am I aware of a fee paid for the use of a name
11 that's separate from a royalty?

12 Q Yes. Are you aware of any instances where there
13 has been an arrangement between the publisher and
14 author that way?

15 A I can't say that I have first-hand experience of
16 that, no.

17 Q Have you heard of any such arrangements on a
18 second-hand basis?

19 A Honestly, no. That's not to say it never
20 happened, but I'm not aware of it.

21 Q Well, in the hypothetical where a comic book
22 publisher were to publish a trade paperback using an
23 artist's name without permission, what do you think
24 would be the most appropriate measure of damages for the
25 use of that name? Would it be royalty based or a flat

1 fee?

2 A Well again, I'm hesitating because this is an
3 unprecedented situation for me. I can tell you that
4 when I -- it really depends on the context. I've had a
5 situation many times where a printer has misprinted a
6 book, and our choices usually are to insist that they
7 reprint it or that they pay a monetary penalty, in other
8 words, they reduce their bill.

9 Q That's to the publisher; is that correct?

10 A That's correct. I haven't had a personal
11 experience where I omitted an author's name. So I can't
12 tell you. I can only tell you the printer, which would
13 be the closest analogy. And my decision then would be
14 based on the severity of the omission or error or flaw.
15 And there have been times when we've insisted it be
16 reprinted, and there are times when we would just say:
17 We can live with it, but knock \$1,000 off the bill or
18 some such -- I would say if it would be -- if it
19 happened with an author, I would negotiate that in good
20 faith, and it would depend on the circumstances.

21 Q Actually my question is a little different, but
22 your response is helpful. Do you have an opinion as to
23 what the value of omitting an author's name from a comic
24 book would be?

25 A No, because I think there is damages in two

1 different levels. I mean, depending on the prominence,
2 but I'm not sure the context of your question, but if,
3 for example, a star creator believed his name should be
4 on the cover and it was omitted, that would harm his
5 reputation, arguably, and it would also harm the
6 publisher's sales. So it's hard to -- I'm not sure what
7 exactly you're looking for here.

8 Q Well, is it your understanding that it's
9 typically within the publisher's discretion to list an
10 author on the cover if there are multiple authors and
11 characters used in the book?

12 A In my own experience that's usually defined
13 contractually. I am sometimes obliged to use a name
14 when I would not ordinarily. And there are times when I
15 want to use a name even if the author doesn't care. And
16 again, that's all across the board.

17 Q And there are also times when you have the
18 discretion as to whether or not to use the author's
19 name?

20 A That is true. For example, in "The Spirit"
21 anthologies I mentioned earlier, there were usually too
22 many creators to put on the cover. So I would instruct
23 my editor to list the two or three biggest names on the
24 cover.

25 Q Right.

1 A While not contractually obligated to use any
2 other than Will Eisner, the creator.

3 Q Now, going back to the other situation, that is
4 using an author's name without his permission on a trade
5 paperback, and we'll take the time period -- we'll say
6 around 1996. What is your opinion as to the value of
7 using Mr. Gaiman's name without his permission on a
8 trade paperback in or about 1996?

9 A I don't think I can quantify that in a vacuum.

10 Q Can you quantify it at all?

11 A Not from personal experience. It never happened
12 to me, and I don't recall having an author tell me about
13 their experience. But I'm sure there is some value one
14 could determine, from -- you have to put it in some
15 monetary context, and I think a circulation context. In
16 other words, if this were a first printing of a book and
17 the author objected, I would probably come to some
18 reasonable settlement on the omission and then I would
19 agree to put the name on subsequent printings.

20 Q Actually, my question is different than an
21 omission. I'm now focusing on using an author's name
22 without his permission, not leaving it off, but using it
23 on a trade paperback. And my question would be, you say
24 it's difficult to come up with a value for that, what
25 would be the criteria you would use? Would it be the

1 sales, the cover price?

2 A I think -- yeah. I think you'd have to start
3 with the circulation and the cover price. Certainly you
4 have to come up with -- in my own opinion, you'd
5 calculate a profit and you'd say what portion of that
6 profit applied. And you can't do it in a vacuum.
7 I can't --

8 Q So your expert opinion would be it should be
9 based on profits and not royalties; is that accurate?

10 MS. EADS: Objection as to form.

11 THE WITNESS: Yeah. Just because it's
12 unprecedented for me. You're asking me to kind of
13 invent something to a very uncommon situation.

14 Q (By Mr. Feldmann) Well, would you be more
15 comfortable with the statement, and correct me if I'm
16 wrong, that because it's unprecedented, it would just be
17 too speculative to come up with an appropriate measure
18 for using someone's name on a trade paperback, that is
19 Mr. Gaiman's name on a trade paperback without
20 permission?

21 A No. I think you could come up with something
22 specific, but what you're giving me is just too vague a
23 context. I think if --

24 Q Well, what other information would you need?

25 A Again, if it were me and if the author's name was

1 used without permission, if I did not have the
2 contractual permission to use that name and the author
3 objected, then I would have to calculate fair
4 compensation. And I would say it would be -- a portion
5 of the profit would be one way of doing it, or a portion
6 of a royalty would be one way of doing it.

7 Q Well, do you think that the author would be
8 entitled to both or would it be an either or?

9 A Well, to be honest, I would negotiate it in good
10 faith. Without a precedent I can tell you in my own
11 self interest I would probably start with the one that
12 most benefited me. But I think either course would be
13 logical. I guess, you know, when you started out
14 hypothetical and then you made it Neil, so I'm just
15 trying to think in the context of if it were Neil and I
16 was sitting across the table from him and he was angry
17 at me because I used his name without permission, I
18 would say: What would make you happy here? That would
19 be the logical response. If he said he wanted a portion
20 of the royalty, I'd say how much, and if it sounded
21 reasonable to me, I would either compromise or I would
22 say: That's insane, you know, sue me. But I would try
23 to come up with a reasonable solution. And it might be,
24 Neil, I'll give you, you know -- again, depending on if
25 it were say two authors in the book, an artist and an

1 author, or whether there were multiple contributors, I'd
2 have to know the whole context and I would try to come
3 up with an equitable compensation, because you know,
4 those are the kinds of problems you want to go away.
5 You don't want to anger a creator, and you don't want to
6 be sued. And in my experience, you work those things
7 out.

8 Q Well, you mentioned the words reasonable and
9 equity and good faith. If there were two authors, that
10 is someone for the script and someone for the art work,
11 and this is a use of a name without permission on a
12 trade paperback, what do you think would be a reasonable
13 royalty payment for that?

14 A You're saying there were two authors and one
15 artist?

16 Q No. I used the word author to include the artist
17 so I'll withdraw that. We'll say an author of a script
18 and an artist, two cocreators as it were.

19 A Right.

20 Q And the author who authored the script, his name
21 has been used on a trade paperback without permission.
22 What do you think would be a reasonable royalty to pay
23 him for use of his name without permission?

24 A Depending in part on the what the normal royalty
25 would have been in the first place, and I would just say

1 off the top of my head, 10% of cover being a normal
2 range royalty. And assuming a 50/50 contributory level,
3 you know, maybe 25% of the normal royalty.

4 Q So if I'm correct, that would be another 1-1/2%
5 additional payment for a total of 6-1/2% where there
6 were cocreators?

7 A To me that would be a reasonable area, and that's
8 what I would suggest. Maybe it could be twice that. I
9 would say in the range of a reasonable settlement I
10 would find that a comfortable range. That's all I can
11 tell you.

12 Q Just so that I'm clear here, taking the
13 assumption of 10% overall royalties split two ways, 5%
14 to the artist, 5% to the author, you feel that an
15 additional payment of 1-1/2% to 3% would be reasonable
16 compensation for using an artist's name on a trade
17 paperback without permission?

18 A I personally would find that in a comfortable
19 range, but it depends on the names. Again, for example,
20 if you're specifically talking about Neil, and arguably
21 his name is more valuable or he would argue that the
22 book had harmed his reputation or the -- again, the
23 context of it is important. This could be something
24 that embarrassed the author.

25 Q I'm talking about the assumption here where the

1 author did write the script and we're talking about Neil
2 Gaiman.

3 A Okay.

4 Q Would your reasonable range of 1-1/2% to 3%
5 change at all under those assumptions?

6 A That's my gut instinct of where I would start.
7 And I'm speaking as a publisher here, not as an author.
8 If I was the author I might be more aggressive in the
9 other position, obviously. As I said at the beginning,
10 I'm answering from my sole self-interest, speaking as a
11 publisher in this instance.

12 Q Well, speaking as an expert in this case, would
13 your opinion change as to the reasonableness of that
14 range?

15 A You've got to remember. I'm here as an expert,
16 but my background falls into several categories. I've
17 been a publisher, a retailer, an artist, all kinds of
18 hats that I've worn. I was speaking in the context of a
19 publisher trying to settle that kind of a claim.

20 Q Okay. Well now, putting on a different hat, that
21 of an expert who is coming to an opinion based on a
22 market price for that claim, what do you think a
23 reasonable range would be to compensate Neil Gaiman
24 under that set of assumptions we discussed?

25 A Well again, it's difficult for me here because I

1 haven't been asked to offer any opinions in this area
2 and I haven't done any independent investigation of this
3 area. As I said, it's to me unprecedented. In 30 years
4 I never had an issue where a name was used without
5 permission. So I'm giving you a theoretical response.
6 And as I said earlier, it's not a common situation at
7 all.

8 Q No. I understand that, and I understand that's
9 difficult. I guess sitting here today testifying as an
10 expert I would ask you to either tell me a range or
11 agree with the assertion that you cannot offer me a
12 range sitting here today right now.

13 A I'd want to investigate further before I could
14 really give you a specific response. I just don't feel
15 it's fair to opine on this theoretical situation. It's
16 out in left field in my experience. I'd just want to
17 investigate further.

18 Q So sitting here today, though, you have no
19 opinion?

20 A Well, the most honest response I can give you is,
21 if I had to answer this, I would say let me do a little
22 research. I'd call people in the publishing industry.
23 I'd talk to other agents, authors, people and say: Has
24 this happened to you or your client, and how was it
25 resolved?

1 Q And I appreciate that, but I mean as of right
2 now, do you have an opinion as to what a reasonable
3 range would be for that type of claim?

4 A I would only say I would negotiate something and
5 I just can't give you a specific number.

6 Q Okay. All right. What percentage of your time
7 is spent on Comic Book Legal Defense Fund matters, which
8 I'll refer to as CBLDF?

9 A It's strictly voluntary. I'm not paid for that.
10 And I have one monthly meeting that takes probably the
11 better part of a day. And I have periodic conference
12 calls and one annual meeting that goes on interminably.
13 I've never added it up, but I would guess in a given
14 month, oh, 10 hours a month ball park, except when there
15 is a crisis.

16 Q Okay. You founded the CBLDF; is that right?

17 A Yes, I did.

18 Q And its purpose is to protect the first
19 amendment; is that right?

20 A As it pertains to the comic book industry.

21 Q And generally, that organization would want to
22 see a broader interpretation of the First Amendment
23 rather than narrowing authors' rights; is that accurate?

24 A Correct.

25 Q Did you ask Neil Gaiman to join the Board of that

1 organization?

2 A Did I personally?

3 Q Yes.

4 A My recollection is that when we had a vacancy a
5 number of names were thrown out, and because Neil had
6 been very active and because of his high name
7 recognition, we felt that he would be a great addition.
8 It was a group discussion. I don't recall if I
9 specifically invited him. It was a Board decision.

10 Q So it's possible you did solicit him to join your
11 Board?

12 A I may have been the one who specifically invited
13 him. My best recollection is that the Executive
14 Director may have done that. But honestly I don't
15 recall.

16 Q What approximately is the annual budget of that
17 organization?

18 A Budget or revenue? I mean we raise about
19 \$250,000 a year. And depending on the cases that we're
20 dealing with, we may have a surplus at the end of the
21 year or we may dip into our reserves. But that's the
22 approximate revenue in a engineer.

23 Q How much money has Mr. Gaiman or any organization
24 affiliated with him raised for the CBLDF?

25 A Well, I certainly don't have that data at hand.

1 I know that Neil has on several occasions made national
2 tours we called the Guardian Angel Tour, and he would
3 speak. And all of the money from the gate at every
4 venue would go to the CBLDF, less any direct overhead
5 for the venue itself. Neil didn't take anything. One
6 hundred percent of it went to the fund.

7 Q How much did that raise?

8 A You know, I just don't have those numbers
9 memorized, but it was a substantial sum. Subject to
10 verifying it, I believe the last tour raised \$30,000 or
11 \$40,000.

12 Q Does he raise more than \$100,000 for that
13 organization?

14 A It's conceivable cumulatively, but if not, it
15 would be certainly close to that.

16 Q In total or on an annual basis?

17 A No. I'm saying in total.

18 Q Is it industry practice to get written consent
19 from an artist to use his name to publish a trade
20 paperback if the artist has already consented to using
21 his name in the original comic books?

22 A In my experience that's in the contract, and
23 every contract I had over the last decade or so, I had a
24 specific clause which allowed us to use the name and
25 image for publicity purposes, for book jackets, that

1 sort of thing. It's the kind of thing in my view and
2 experience publishers spelled out, because it's
3 dangerous to not have it spelled out.

4 Q You're referring to written contracts?

5 A Yes.

6 Q Now, suppose you have a situation where a comic
7 book is being published pursuant to an oral contract.
8 Is it industry practice that the artist has to give
9 permission a second time, orally, written, or otherwise
10 before using his name in a trade paperback incorporating
11 those original comic books?

12 A Well, as I'm sure you know, an oral contract
13 isn't worth the paper it's written on, but -- an old
14 lawyer's joke, right.

15 Q That's your legal opinion; is that correct?

16 A The problem -- I mean, in my experience, this is
17 why I certainly try to avoid oral contracts. It's been
18 my personal experience to always get things in writing,
19 both in terms of correspondence and in terms of
20 contracts. So that's the dangerous ground. I in
21 general, my own experience, err on the side of being
22 cautious, and you check with authors, you asks their
23 permission for almost everything. That's what I
24 instruct my editors to do.

25 Q Are you aware of any situations where comic books

1 have been published pursuant to just an oral contract?

2 A Yes, I am.

3 Q And in those situations, are you aware of a
4 publisher having to receive permission a second time to
5 use the artist's name on a trade paperback?

6 A I can't specifically say that I am. And again,
7 by the nature, a verbal contract is usually between two
8 parties who trust each other very much, and I've had
9 those over the years. Or they're between what I would
10 regard as more amateurish professionals who aren't
11 experienced enough to get it in writing. It's just a
12 dangerous thing in general to rely on a handshake. It's
13 one of the earliest lessons I learned in the industry.
14 In fact, I wrote an article in the "Comics Buyers'
15 Guide" a couple of years ago about how Will Eisner
16 forced me to enter into a contract with him when I was a
17 young hippie publisher and I resisted it. He gave me a
18 lecture and explained to me how a contract protects both
19 parties, a good contract, and changed my entire business
20 philosophy. So I from a very early point on taking his
21 advice, and I found myself in that situation, unless it
22 were a very good friend and his handshake was gold to
23 me, and even then I have misgivings.

24 Q Are you aware of any situations where a comic
25 book or trade paperback has been published pursuant to

1 an oral contract where the publisher had to receive
2 permission to use the artist's or the author's
3 biographical information in the trade paperback?

4 A No. That's way too specific for me to be aware
5 of. No, I'm not aware. You have to understand, also,
6 that in general I would not be aware of whether someone
7 had a contractual agreement or an oral agreement,
8 because these aren't the things that come out unless
9 there is litigation like this. My presumption always in
10 publishing is that there is a written agreement.

11 Q Now, I think you testified earlier, correct me if
12 I'm wrong, that you haven't had any direct conversations
13 with Mr. Gaiman about an intention of his to contribute
14 any proceeds from "Miracle Man" or "Marvel Man" to the
15 CBLDF; is that correct?

16 A That's absolutely correct.

17 Q Now, I'm not asking about direct communications
18 with him, my question is geared towards are you aware of
19 that intention by Mr. Gaiman from any other sources,
20 other than Mr. Gaiman?

21 A No, not at all. I assure you. In fact, I've
22 taken great pains to keep at arm's length. I regard my
23 serving as an expert here as completely separate from my
24 role with CBLDF and we've had absolutely no cross
25 conversations.

1 Q Now, is it your opinion that requiring a
2 publisher to get an author's prior consent to print the
3 author's biographical information is consistent with the
4 First Amendment?

5 A I don't --

6 MS. EADS: Objection as to form. Do you want to
7 repeat that question?

8 Q (By Mr. Feldmann) Well, I --

9 THE WITNESS: Would you please repeat it?

10 Q Sure. Is it your understanding that -- you're
11 apparently President of the Comic Books Legal Defense
12 Fund; is that correct?

13 A Right.

14 Q Is it your opinion that requiring a publisher to
15 get an author's prior consent to print the author's
16 biographical information is consistent with First
17 Amendment freedom of expression?

18 A I don't see it specifically as First Amendment
19 related. I mean to me, there is standard practices in
20 the industry, and you, again, normally have a written
21 understanding about these things. You're asking me if
22 Mr. McFarlane's First Amendment right was violated by
23 not being able to use that? Is that what you're asking
24 me in essence?

25 Q Yes. If Mr. McFarlane or any other publisher at

1 Image Comics decided that it wanted to publish
2 biographical information about an author, would it be
3 required to get that author's consent, or would it face
4 liability in a court of the law for not having done
5 that?

6 A I would say the only way I can answer that is
7 customarily, yes, it's required to have permission. But
8 I guess it comes under perhaps a fair use argument. But
9 I can tell you that in 17 years, I mean, we've never had
10 anybody come to the CBLDF with this kind of a question.
11 Usually they're much more substantive in terms of
12 dealing with censorship, somebody being arrested,
13 somebody being -- you know, some significant violation
14 of the First Amendment. I would regard this as,
15 frankly, a little too small to be -- to ever come before
16 us. That's not to say in the very broadest sense you
17 can't make a free expression argument, but I just don't
18 see the --

19 Q Well, I just have one more question just to
20 confirm my understanding of your answer. So is it true
21 that the CBLDF has not sought an opinion from its
22 outside counsel as to whether or not the relief sought
23 by Mr. Gaiman in this lawsuit violates the First
24 Amendment?

25 A I can assure you that that has not happened.

1 MR. FELDMANN: All right. Thank you, sir. I
2 don't have any further questions.

3 MS. EADS: Anybody else?

4 MR. KAHN: This is Mike Kahn, I have nothing
5 further.

6 MS. EADS: Gina?

7 MR. SMITH: This is Todd Smith. No. We have
8 nothing further from Wisconsin.

9 MS. EADS: Okay. We all thank the witness.
10

11 I, DENNIS KITCHEN, hereby state that I have read
12 the foregoing questions and answers appearing in this
13 transcript of my deposition, and that this is a true and
14 accurate (corrected) report of said answers given in
15 response to the questions appearing herein.

16

17

18 _____
DENNIS KITCHEN

19 Subscribed and sworn to before me this _____
20 day of _____, 2002.

21

22

23 _____
NOTARY PUBLIC

24

25

CERTIFICATE

I, Lisa A. Smith, RPR, CCR, IL CSR, Notary Public in and for the State of Missouri, do hereby certify that, pursuant to notice, the deposition (via telephone conference) of DENNIS KITCHEN was held on the 10th day of September, 2002, said witness was by me first duly sworn upon his oath to testify to the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon examined upon his oath, and his examination was taken in shorthand by me and later transcribed into computer-aided transcription under my supervision, and that the deposition is a true record of the testimony given by the witness.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal this 11th day of September, 2002.

Lisa A. Smith, RPR, CCR, IL CSR
CCR #647